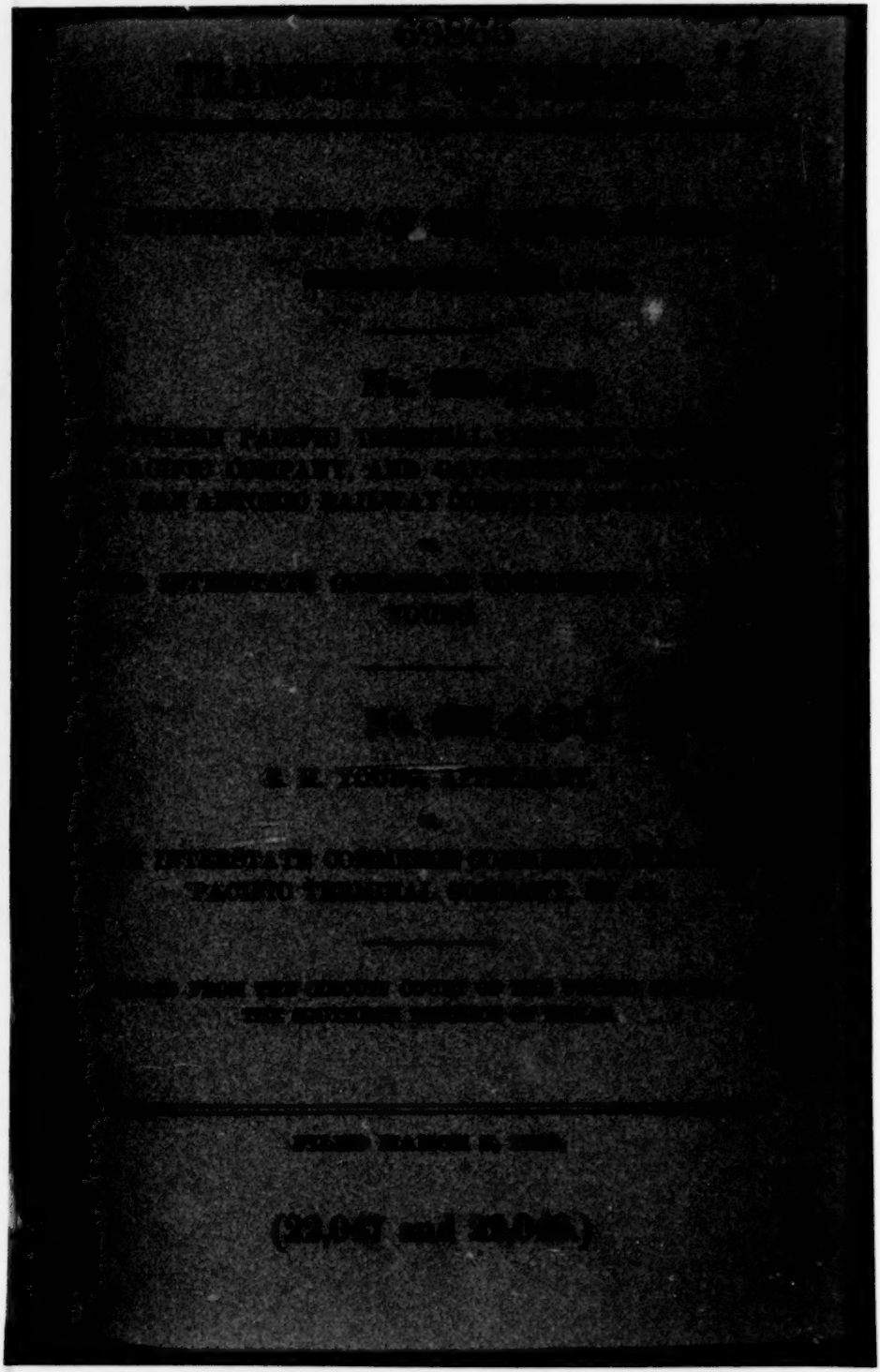

(22,047 and 22,048.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 821.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, AND GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, APPELLANTS,

vs.

THE INTERSTATE COMMERCE COMMISSION AND E. H. YOUNG.

No. 822.

E. H. YOUNG, APPELLANT,

vs.

THE INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY, ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

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1–4 United States Circuit Court, Southern District of Texas, Holding Sessions at Galveston.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC Company, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Be it remembered, that, in the above entitled and numbered cause, lately pending in said Court, in which a Final Decree was entered at a Special Term of said Court, to-wit, on the 23rd day of December, 1909, the following proceedings were had and taken in said Court, to-wit:

5 Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC Company, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Bill of Complaint and Order Thereon.

Filed August 13, 1908.

Compared.

6 In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

No. 504. Eq.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC Company, and Galveston, Harrisburg & San Antonio Railway Co., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of Texas:

Southern Pacific Terminal Company, hereinafter, for the sake of brevity, called the Terminal Company, a corporation duly incorpo-

rated under the laws of the State of Texas, and thereby a citizen thereof; Southern Pacific Company, a corporation duly incorporated under the laws of the State of Kentucky, and thereby a citizen thereof; the Galveston, Harrisburg & San Antonio Railway Company, hereinafter, for brevity, called the Railway Company, a corporation duly incorporated under the laws of the State of Texas, and thereby a citizen thereof, and which has its principal operating office in the city of Houston in Harris County in the South-
7 ern District of Texas, bring this their Bill of Complaint against the Interstate Commerce Commission, a body corporate, duly organized and existing under and by virtue of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," and the various acts supplementary thereto, hereinafter, for the sake of brevity, called the Commission, of which Honorable Martin A. Knapp, a resident and citizen of the City of Washington, District of Columbia, is the chairman, and Edward A. Moseley, Esq., of the City of Washington, District of Columbia, is the secretary, and against E. H. Young, a resident and citizen of the County of Galveston, in the Southern District of Texas, and thereupon Your Orators complain and say:

I.

The matter and amount involved in this suit exceed the sum and value of two thousand dollars, exclusive of interest and cost. The suit arises under the constitution and laws of the United States, as will hereinafter appear, and among other things, in that the suit is brought under powers granted and jurisdiction conferred by the aforesaid acts to regulate commerce as well as under the general equity powers of this court.

II.

At the time of the entering of the order hereinafter referred to, and continuously since on or about the seventeenth day of March, 1884, Southern Pacific Company has been a corporation duly organized under the laws of the State of Kentucky, as aforesaid. Under and by virtue of its articles of association there were granted to it, among other things, the power to have perpetual succession and be capable in law to purchase, grant, sell, receive in trust or otherwise, all kinds of personal and real property to such an amount as from time to time its directors might determine, to contract and be contracted with; to make, establish and alter such by-laws, rules and regulations for the government of the conduct of its business as should be necessary or expedient for the management of its affairs, and generally to execute all acts, matters and things which
8 might be necessary or convenient to carry into effect the powers and privileges granted by its Article- of Incorporation. Under and by virtue of said Articles of Incorporation, it is further empowered and has the right to contract for, acquire and hold by purchase or other-, bonds, stocks, obligations and securities of any corporation, company or association existing at the time of its incorporation or thereafter formed or constituted, and also to acquire and hold by purchase or otherwise, bonds, obligations and securities of any

individual, state, territory, government or local authority whatsoever, and to enter into contracts with any corporation, company or association, individual, state, territory, government or local authorities in respect to their bonds, stock, obligations and securities, or in respect to the construction, establishment, acquisition, owning, equipment, leasing, maintenance, or operation of any railroads, telegraphs, or steamship lines, or any public or private improvements, or any appurtenances thereto, in any state or territory of the United States, or in any foreign country; and also is so empowered to buy, hold, sell and deal in all kinds of public and private stocks, bonds and securities.

III.

The Galveston, Harrisburg & San Antonio Railway Company is now, at the time of the entering of the order hereinafter referred to was, and since long prior to that time continuously has been, a corporation duly incorporated and existing under the laws of the State of Texas as a railroad corporation, chartered for the purpose of owning and operating a railway, with all the powers and privileges given by the laws of the State of Texas to railway corporations. During all said time it has owned and operated a railway lying wholly within the State of Texas, and since about the year 1900 extending from the City of El Paso, Texas, to and into the City of Galveston in said state. During said time, said railway company has been engaged in the business of operating its railway and in carrying freight, the carriage of a part of which commenced and terminated within
9 the State of Texas, being commerce entirely local to that state.

In addition thereto, during all said time, said railway company has also been engaged in interstate commerce in the carriage of freight and passengers between the states and territories of the United States in connection with other railways under joint through arrangements and joint tariffs of rates, fares and charges duly established, published and filed with the Commission under the Acts of Congress to regulate commerce, to which acts said railway is subject in the interstate carriage of freight and passengers.

IV.

In the year 1836 the present state was the Republic of Texas, with right in and sovereignty over all navigable or not navigable waters, and all public lands in the republic, and especially with such right in and sovereignty over Galveston Bay, an inland body of water lying between Galveston Island which was a part of the Republic of Texas, and the mainland. The Republic of Texas declared its right of sovereignty over Galveston Bay and its right and ownership in it, and in the lands underlying it, which right was not disputed, but recognized by the other nations of the world. About December, 1836, the Republic of Texas, by legislative act, in consideration of fifty thousand dollars to be paid by Michael B. Menard, granted to him and such associates as he might thereafter include, one league and labor off the east end of Galveston Island, and enacted that the President of the Republic should issue to said Michael B.

Menard and such associates as he might include, a quit-claim title to said land in the name of the Republic of Texas. Said Menard paid off and discharged said sum and satisfied all liens and requirements of the Republic of Texas. Thereafter in January 1838, the President of said Republic issued to said Michael B. Menard a patent under and by virtue of said grant, vesting in said Menard all the right, title and interest of the Republic of Texas in the lands covered by said patent. Under and by virtue of said grant and patent all the lands on the east end of Galveston Island, including the shores and flats on the north side of Galveston Island, extending as
10 far west as the west line of said Menard grant and extending under the waters of the Bay to the channel or harbor line in the north line of the grant, passed to said Menard in fee simple title. Said Menard, his associates and assigns acquired riparian rights in the waters of the bay and as full ownership in the waters covering any part of said grant as could be conveyed by a fee simple title granted to the lands underlying the waters by the sovereignty of the soil. These rights of the said Menard, his associates, grantees and assigns, have been recognized and confirmed by the State of Texas and adjudicated in its courts. Under and by virtue of said grant, said Menard, his associates, successors and assigns took the right to erect, maintain and operate piers, docks, wharves at any place on said grant and to convey, lease and dispose of the same and grant right of occupancy thereon and use thereof.

(The act making said grant to said M. B. Menard, a copy of the patent issued to him, and the adjudications of the courts of the State of Texas showing the passage of the title to said lands on the east end of Galveston Island to the channel of Galveston Bay as the north line thereof, will be exhibited to the court on the hearing of the application for preliminary injunction and on the final trial of the cause.)

V.

On or about the fifth day of February, 1841, the Galveston City Company was duly incorporated under the laws of the Republic of Texas, and has continued since then as such corporation, recognized by, and acting under, the State of Texas. Among other things it was empowered under its act of incorporation to hold and convey property, real, personal or mixed, and to do all things necessary for this, and all things necessary to carry out any of its corporate functions. The said M. B. Menard conveyed in fee simple title to the Galveston City Company the aforesaid grant of land and all the rights, title and interest received from the Republic of Texas under said grant and said patent. (A certified copy of said deed from the Record of Deeds of Galveston County will be exhibited on the
11 application for preliminary injunction and on the final hearing of this cause.)

VI.

The Galveston City Company laid out and platted on said Menard grant a site for a city, to be known as the City of Galveston. (A plat of so much of said city as may be necessary to explain the loca-

tion of said property conveyed to Collis P. Huntington, and the situation of streets and alleys with reference thereto, will be exhibited to the court on the hearing of the application for preliminary injunction and the final hearing of this cause.)

Said city on said plat was subdivided into lots, blocks, avenues, streets and alleys, the avenues running east and west, the streets north and south and being numbered from the east. No lots, blocks, avenues, streets or alleys on said map were laid out or platted on the property hereinafter described as conveyed to Collis P. Huntington, which property lies north of Avenue B and west of the prolongation of the east line of Forty-first street and east of the prolongation of the east line of Fifty-first street. The most northern street adjoining said property as platted on said map is Avenue B. On said original plat running as far west as Thirty-first street, there was platted "Avenue A," being one block or about two hundred and sixty feet north of Avenue B. Long subsequent to the platting of said city of Galveston there was referred to as lying north of Avenue B, lots 701 to 710 inclusive. These lots are treated as two hundred and sixty feet north and south and three hundred feet east and west, and on the map to be exhibited to the court on the hearing, appear under the numbers aforesaid. There also appears north of them what is known as Avenue A, or "Water Street," and through these blocks appear the extension of certain streets. But the so naming of said blocks from 701 to 710 inclusive was purely arbitrary, and adopted solely for the purpose of aiding the description of the property conveyed to Huntington. Said blocks were never in fact laid out, and no streets, alleys or avenues were ever opened be-
12 tween or adjoining said blocks, and have never in any way been opened on said land conveyed to Collis P. Huntington.

Avenue B, adjoining and south of said property, has never been opened by the City Company or the City of Galveston hereinafter referred to. Immediately south of Avenue B is Avenue "C;" south of that is Avenue "D," and south of that is Avenue "E." None of the streets, avenues and alleys lying north of Avenue E and west of Forty-first street and east of Fifty-first street, have ever in fact been opened and so far as platted have been closed by ordinance of the City of Galveston, and north of said Avenue E the blocks and intersecting streets, avenues and alleys are owned by sundry railway companies and occupied by numerous railway tracks.

VII.

On or about the fifth day of February, 1840, the City of Galveston was duly incorporated as a municipal corporation under the laws of the Republic of Texas. There have been various amendments to its charter since said time, but continuously since that date it has been as aforesaid a municipal corporation, first under the Republic, then under the State of Texas, with municipal control of its streets and alleys under and according to the laws of said state, save and except as they may be modified by the grant to Menard. Your Orators say on information and belief that the City of Galveston as originally platted, was different from the plat as laid out by the Galveston City

Company, and nothing was platted on it west of Twenty-third street, but said plat was never placed of record, was entirely disregarded, and has disappeared. The aforesaid plat of the Galveston City Company was adopted as the plat of the City of Galveston, and became the plat by which property in the city was sold.

VIII.

On or about the 25th day of January, 1899, the said Galveston City Company, being the owner in fee simple title, conveyed to said Collis P. Huntington the following described lot or parcel
13 of land situated, being a part of the Menard grant, on the Island of Galveston, to-wit: Beginning at the southerly corner of block 710, as shown on a map attached to said deed, and thence along the westerly line of block 710 and the prolongation thereof in a straight line in a northerly direction 2860 feet, more or less, to the six-foot contour as shown on said map; thence in an easterly direction along said contour to a point where it would be intersected by the prolongation of the westerly line of block 700 if continued in a straight line; thence in a southerly direction along said prolongation thereof and the westerly line of block 700 to the southwesterly corner of block 700; thence in a westerly direction along Avenue B in said city 3800 feet more or less to the point or place of beginning. The same including all the blocks 701 to 710 both inclusive, together with all the lands, and lands under water, lying northerly of said Avenue B between the westerly line of said block 700 and the prolongation thereof, above mentioned, and the westerly line of block 710 and the prolongation thereof, above mentioned, to the southerly boundary line of the six-foot contour.

Said six-foot contour was intended to be, and is, the channel line named in the original Menard grant.

Said deed further provided to convey, and did convey, to the said Collis P. Huntington, his heirs and assigns, all rights, privileges and franchises to which the Galveston City Company was entitled or might become entitled, in connection with, or appurtenant to, said lands, the lands under water and other properties or to be exercised thereon and thereover, and further conveyed to said Huntington, his heirs and assigns all its right, title and interest in respect to Avenue B between the westerly line of block 700 and the westerly line of block 710, and in and to, and in respect to, any streets, avenues or alleys north from Avenue B between such lines and between the prolongations of Forty-first and Fifty-first streets. Said deed duly warranted to said Huntington, his heirs and assigns the title to all said lands as far north as 150 varas northerly from the shore of
14 Galveston Bay, as existing January 25, 1838, by general covenants of warranty and by covenants of special warranty the lands underwater lying between the lands so conveyed by general warranty, and the northern boundary of the lands named in said deed. Said deed acknowledged the receipt of fifty thousand dollars paid to said Galveston City Company by said Huntington, and provided that he should pay the said company the further sum of one hundred and fifty thousand dollars in three equal portions of fifty thousand

dollars each, on or before the expiration of one, two and three years respectively from the date of the delivery of the deed, with interest from date at four per cent per annum, and reserved a vendor's lien to secure said payment. Said deed further provided that it was made on the covenants and condition that after the City of Galveston should have closed such streets and avenues as might exist north of Avenue B and after the obtaining of the requisite powers, if any were requisite, from the City of Galveston, the State of Texas and the United States of America as to the construction of piers and the dredging of slips between them to the harbor line of 1897, so as to secure at least twenty-five feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom, and so as to secure a connection by a continuous channel twenty-five feet in depth at mean low water from said piers to the Gulf of Mexico so as to permit steamers at least five hundred feet in length and fifty feet beam, drawing at least twenty-five feet of water to conveniently go at mean low water from the Gulf of Mexico to, and in alongside of, said piers; that the said Huntington, his heirs or assigns should within six months after such time commence the construction of terminal facilities upon the property above described for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, and should within two years thereafter expend the sum of at least one hundred and fifty thousand dollars in the construction of such piers and such dredging, and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems, their heirs or assigns.

15 The deed further provided that upon the failure to expend within said period of two years the said sum of $150,000, the title to the property conveyed should revert to the Galveston City Company, and said company should be entitled to retain as forfeited to it as liquidated damages the consideration for the conveyance, whether theretofore paid or still remaining to be paid therefor.

(A certified copy of said deed from the Records of Galveston County, Texas, with map thereto attached, will be exhibited to the Court on the application for preliminary injunction and the final hearing of this cause.)

Said Huntington, his heirs and assigns, within the time provided in said deed, expended more than the sums of money therein called for, obtained all necessary or proper ordinances as will hereafter appear, from the City of Galveston, and the enacting of all necessary or proper laws by the State of Texas. No laws were needful to be enacted by the government of the United States. There were erected at an expense of far more than $150,000, piers and wharves on said premises, as will hereinafter appear. The bay between them to the ship channel, being the harbor line of 1897, was dredged to a depth of twenty-five feet, so that ships of over five hundred feet in length and drawing more than twenty-five feet of water could berth at said piers and wharves, and could go to and from them through the Galveston channel to the Gulf of Mexico and over the high seas. The conditions and covenants undertaken by said Huntington in

said deed were in all things complied with, recognized by said Galveston City Company so to be, and said company on to-wit the fourth day of April, 1901, duly acknowledged the fulfillment on the part of said Huntington, his heirs and assigns of all the requirements and conditions of said deed, and by its certain instrument of that date, which will be exhibited to the court on the application for preliminary injunction and the final hearing hereof, acknowledged the receipt of the payment of the unpaid purchase money, released the vendors' lien aforesaid, declared the fulfillment of the conditions of the terms of said contract, and the said Huntington in the
16 meantime having died, acknowledged receipt of payment of the balance of the purchase money, and declared that Collis P. Huntington, his heirs and assigns within the time specified and required did commence the construction of terminal facilities upon the property conveyed in said deed, and did within said time expend more than the sum of $150,000 in the construction of piers and dredging and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems. Whereby said lands passed to the said Collis P. Huntington, his heirs and assigns, free from any condition in any deed, and became the property of his heirs and assigns, as hereinafter shown in absolute title, which on information and belief Your Orators aver to be a fee simple title.

IX.

Said Collis P. Huntington, in acquiring the properties above shown, was desirous that there should be established upon them, piers, docks and wharves for the carrying on of a wharf business, and that the permanent owners of the properties should have the right to devote so much thereof as they deemed necessary or expedient as terminal facilities.

While the right of the city to open any streets, avenues, or alleys across said land or to prolong any existing streets across it was not admitted, at the same time it was desired there should be no suggestion or claim of such right and that the city should release all right or apparent right it had to open such streets, avenues, or alleys, or to prolong the streets and should abandon any right or apparent right so to do and any right or apparent right in the lands beyond the streets or alleys, so that the right and ownership or use of said property by said Huntington, his heirs and assigns, might be unimpeded by any claim of the city. Said Huntington, on or about the 4th day of Feb'y, 1899, procured, to be passed by the City Council of the City of Galveston, an ordinance abandoning, discontinuing and closing the streets and avenues in the city of Galveston as hereinafter
17 shown. Said ordinance, after declaring that said Huntington had acquired the lands above shown and reciting the consideration named in said deed, further provided and declared that no streets, avenues or alleys had ever been opened, constructed or utilized through said property and that no streets, avenues or alleys had ever been laid out, designated or recognized by the City of Galveston or the owners of the property, northerly of the north lines of said blocks

700 to 710 inclusive, and further provided and declared that it was to the interest of the City of Galveston that the improvements contemplated by said Huntington should be made, and that it was to the interest of said City that there should be no streets, avenues or alleys opened through or across said property, then enacted and declared that all streets, avenues or alleys, if any, theretofore opened, laid out or in any manner designated upon, through, or across said property, setting forth the same by metes and bounds, should be and were in all things perpetually abandoned, discontinued and closed. Said ordinance further provided that said Huntington, his heirs and assigns were authorized, empowered and granted the right to perpetually construct and maintain piers as he or they might from time to time determine upon the property above described, and upon the property lying between the same and the harbor line of 1897, and to dredge between and on the sides of the piers, and northerly and northeasterly therefrom, and from the harbor line of 1897, so as to permit the securing of at least twenty-five feet of water at mean low tide, and beside such piers and northerly and northeasterly therefrom so as to secure connection by a continuous channel of twenty-five feet in depth at mean low water from said piers and the Gulf of Mexico and permit steamers of at least five hundred feet in length and fifty feet beam and drawing at least twenty-five feet of water to conveniently go at mean low water from the waters of the Gulf of Mexico, to and lie alongside of said piers, and maintain the same; and said ordinance further provided that said Huntington, his heirs and assigns should have the right to maintain upon said property terminal facilities for the use of what are commonly known
18 as the Southern Pacific Railroad and Steamship Companies, their successors and assigns. Said ordinance declared that the grant made and the right and privileges conferred were upon conditions that said Huntington should within six months of the ratification of the ordinance and the confirmation of the grant made, and the rights conferred by it, by the Legislature of the State of Texas, commence the construction of terminal facilities upon the property above described, to and for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, and within two years thereafter should expend at least the sum of $150,000 in the construction of such piers and such dredging, and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors and assigns.

All of the conditions of said ordinance were duly fulfilled by said Huntington, as have been above more specifically pleaded. Said ordinance further provided specifically if said Huntington should charge wharfage for the use of piers and other facilities upon said property, except in so far as the wharf service might be covered by the freight rate, such wharfage should be subject to the regulation of the Railroad Commission of the State of Texas, and further specifically in substance declared, that such provision should not be so construed as to permit or allow any other person or corporation to use said property or any portion thereof without the

consent of said Huntington, his heirs or assigns owning the same at the time. Said ordinance thus specifically and directly recognized the right of said Huntington to carry on a wharf business, to charge wharfage, to control and manage the wharves and further recognized his right to permit or allow other persons or corporations to use said property or any part thereof.

(A copy of said ordinance will be exhibited on the application for preliminary injunction and on the final hearing hereof.)

X.

Afterwards, on or about the first day of May, 1899, the Leg-
19 islature of the State of Texas passed an act in which it recog-
nized the title of said Huntington in the property above described, and set forth the ordinance above named, and authorized, ratified, approved and confirmed the same. By said act the State of Texas relinquished to said Huntington, his heirs and assigns, whatever title or claim, if any, it might have in or to any portion of the flats or lands owned, whether as shown in said land above described, and provided that if said Huntington should charge wharfage for the use of piers and other facilities, such wharfage should be subject to the regulations of the Railroad Commission of the State of Texas; but further specifically provided that this should not be so construed as to permit or allow any other person or corporation to use said property or any portion thereof without the consent of said C. P. Huntington, his heirs or assigns owning the same at the time. Whereby said state specifically authorized the charging of wharfage and further recognized the right of said Huntington, his heirs or assigns to permit any other person or corporation to use said property or any portion thereof. The harbor line of 1897, above referred to, is along the north line of said above described property.

XI.

Thereafter, on to-wit the sixth day of July, 1901, the Terminal Company was duly incorporated as above pleaded. By its Articles of Incorporation it was provided that its business should be transacted in the City of Galveston, Texas, and that its principal office and domicil should be located in the City of Galveston in said state and county. The purposes for which said corporation was formed as set forth in its Articles of Incorporation and the powers by said articles conferred upon it, were, among other things, to construct, buy, lease, own, maintain, operate and convey warehouses, docks, wharves and grain elevators, including the construction, owning and operating docks on the coast of the State of Texas for the protection and accommodation of ships, boats and all kinds of vessels for navigation
and their cargoes, and to avail of, use and enjoy, the proper-
20 ties, rights, privileges and franchises granted, described and
referred to in the Act of the Legislature of the State of Texas above shown. By its Articles of Incorporation it was granted the right to construct and maintain piers upon said property and upon any property lying and situate between the same and the Gal-

veston harbor line of 1897, and to dredge between and on the sides of such piers and northerly and northeasterly therefrom, and from the harbor line of 1897 so as to permit the securing of at least twenty-five feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom and so as to secure connection by a continuous channel twenty-five feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least five hundred feet in length and fifty feet beam and drawing at least twenty-five feet of water, to conveniently go at mean low water from the water of the Gulf of Mexico to, and to lie alongside of, said piers, and to maintain the same. Under said charter it was further authorized to construct and maintain upon said property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns. Under said charter, it was further authorized to buy, lease, receive, own, hold and enjoy real and personal property necessary in the transaction of its business.

(Said Articles of Incorporation will be exhibited on the application for preliminary injunction and on the final hearing hereof.)

XII.

Prior to July, 1901, the said Collis P. Huntington died testate. By his will, which was duly probated in the State of New York, in which state he died, and where he was domiciled at the time of his death, he named Arabella D. Huntington, his wife, Charles H. Tweed and I. E. Gates, the executors of his will, with power to sell and dispose of real property left by him, and further made Henry E. Huntington the residuary legatee of all of his property. Said will was duly filed and recorded in Galveston county, Texas, in the manner provided by law under the statutes of the State of Texas for the conveyance of title by will probated in another State, outside the State of Texas, and a copy of it will be exhibited on the
21 hearing of the application for preliminary injunction and the final hearing of this cause. By virtue of said will the legal title to said lands above described as conveyed to Collis P. Huntington passed to his said executors and to said Henry E. Huntington. By their certain deed of July, 1901, certified copy of which upon the application for preliminary injunction and the final hearing hereof will be exhibited. Arabella D. Huntington, Charles H. Tweed, and I. E. Gates as executors of the said Collis P. Huntington, and Arabella D. Huntington and H. E. Huntington in their individual capacity, sold and conveyed to the said Terminal Company all the lands above described as conveyed to the said Collis P. Huntington, together with all the rights, privileges and franchises to which the Galveston City Company or the said C. P. Huntington was theretofore entitled in connection with or appurtenant to such lands, or lands under water, and other properties, or to be exercised thereon or thereover; and also all the right, title and interest at any time theretofore held, or owned by the Galveston City Company or said Collis P. Huntington in, to, and in respect to, the streets and avenues above named; and also all the estate, rights, privileges and franchises granted to said Collis P.

Huntington, his heirs or assigns by the ordinance aforesaid, together with all and singular the estate, rights, privileges and franchises granted by said ordinance or accruing thereunder, or in any way held thereunder by said Collis P. Huntington, his heirs or assigns, and also all rights existent at the time of the deed, or that might thereafter be acquired under or by virtue of said ordinance, and also conveyed to said Terminal Company all the estate, rights, privileges and franchises granted or accruing to said Collis P. Huntington, his heirs or assigns under the aforesaid Act of the Legislature of the State of Texas ratifying and confirming said ordinance of the City Council of the City of Galveston. Also all rights, privileges and franchises that might at any time thereafter be acquired or approved under said act of the Legislature. By which said deed and the instruments hereinbefore pleaded the Terminal Company acquired in and to said lands sold to C. P. Huntington and above described his right, title and interest, together with all rights, privileges and
22 franchises in any way accruing from said ordinance of the City of Galveston, and said act of the Legislature and of the State of Texas ratifying and confirming the same. Your Orators aver said title to be a fee simple title.

XIII.

The Southern Pacific Company neither owns nor operates any railway in the State of Texas. It does own a line of steamships operating between Galveston, Texas, and the City of New York in the State of New York. By virtue of its powers above pleaded, it has acquired and does own and hold as a stockholder the majority of the stock of said railway company. It also owns the majority of stock in some other railways in the State of Texas. All of these railways are separate and distinct corporations, managed by their own board of directors, operated by their own officers, and the connection of the Southern Pacific Company with them is only that of stockholder; but in common parlance it has been usual to refer to the steamship line aforesaid and the railways aforesaid as the Southern Pacific Railroad and Steamship Systems. The Southern Pacific Company by virtue of its charter powers, above pleaded, owns a majority of the stock of the Terminal Company, but the Terminal Company has its own board of directors, its own officers, and is a separate and independent corporation, and is so operated, the connection of the Southern Pacific Company with it being solely that of stockholder. Said Terminal Company and said Railway Company are also operated as separate and distinct corporations, each by its own board of directors and its own officers, and neither own stock in the other, nor has one any control over the other.

XIV.

From time to time since the grant to Menard, there have been conveyances of various lots from Tenth to Forty-first street, to sundry persons who have erected wharves and piers upon the same and carried on a general wharfage business. Piers have also been erected

at the end of what would have been the extension of existing
23 streets and here a wharfage business has been carried on, and it has been ever recognized under the grant to Menard that the purchasers of lots from him could erect wharves and carry on a general wharfage business. About the year 1854 the Galveston Wharf Company was formed for carrying on a wharfage business in the City of Galveston, and by 1900 it was the owner under Menard of the water front from Tenth to Forty-first street. This Wharf Company has erected numerous piers on its property, dredged slips to the channel and provided places for the berthing of ships. On its property it has erected several miles of track, and it owns a number of locomotives. In Galveston, in addition to the G. H. & S. A. Ry. Co., there are the Galveston, Houston & Henderson; Gulf, Colorado & Santa Fe Railroad Company; Missouri, Kansas & Texas Railway Company of Texas; and International & Great Northern Railway Company. These railways are engaged in the carriage of interstate freight and passengers. All of these railways, including the G. H. & S. A. Railway, have direct track connections with the tracks of the Galveston Wharf Company, and said Wharf Company acts as an intermediary between these railways and steamships, berthing at its wharves, in that freight is transferred over the wharves from the cars to the ships and from the ships to the cars. The Galveston Wharf Company hauls freight over its own tracks and with its own engines between ships and cars, its wharves being used as terminal facilities between them, as is hereinafter more specifically shown. The G. H & S. A. Railway has extensive terminal facilities in the City of Galveston entirely separate from the premises of the Terminal Company. It has thus situated its freight depots and about nine miles of track for switching and storage purposes, but as aforesaid, its tracks connect with the tracks of the Galveston Wharf Company. The Terminal Company on its lands also has a number of tracks, but it has no locomotives. The tracks which it owns are simply for the purpose of facilitating the movement of cars on its property. Said Terminal Company is not a common carrier, issues no bills of lading, owns no rolling stock, and in no way engages in the transportation of freight or passengers. The tracks of the Galveston,
Harrisburg & San Antonio Railway Company connect with
24 the tracks of the Terminal Company. When freight reaches Galveston for local delivery, it is handled from the depots of said railway company. If it is for export over certain steamers, it passes over the docks of the Galveston Wharf Company. In other instances it is routed over the docks of the Terminal Company. When freight comes into Galveston by ship which is berthed at a wharf of the Terminal Company used by it, it passes to the Railway Company over these wharves. If it comes in a ship berthed at a wharf of the Galveston Wharf Company, it passes to the railway over these wharves. Where cars pass from the tracks of the said Railway Company or any railway company in Galveston, to the tracks of the Galveston Wharf Company, they are switched by the Galveston Wharf Company itself and a switching charge is made by it. If cars pass onto the tracks on the property of the Terminal Company they are switched by the said Galveston, Harrisburg &

San Antonio Railway Company, which charges a switching charge for this purpose, but a track charge of fifty cents per loaded car is made by the terminal Company for all loaded cars passing on its tracks. Neither of Your Orators own any stock or have any interest in said Galveston Wharf Company, nor has it any stock or interest in the Terminal Company.

XV.

The Terminal Company being incorporated as aforesaid, desired to do, and under its charter was empowered to do, a general wharfage business. The terminal facilities which it was empowered to furnish and which it expected to furnish for the so-called Southern Pacific Railroad and Steamship Systems, was this: It expected, and under the charter was authorized, to provide on the properties conveyed to C. P. Huntington above described, wharves and docks where there could be berthed for loading and unloading the steamships of the Southern Pacific Company plying as aforesaid between Galveston and New York, where also could be berthed other ships coming into the port of Galveston. All ships berthing at the wharves provided for this purpose and operated by the Terminal Company there discharge and take on freight which comes from or passes to any of the railways operating in the city of Galveston. All freight which passes over the piers of the Terminal Company used by it, to-wit, A and B, hereinafter named, pays to the Terminal Company a regular wharfage charge. In order that the Terminal Company might provide wharves over which it could handle freight passing between the ships of the Southern Pacific Company and the G. H. & S. A. R'y Co. as well as freight passing between said railway and other ships, or between said ships and other railways, as well as freight from ships destined for Galveston, the Terminal Company constructed on its said properties south of said channel, two piers, known as "A" and "B" Pier A being the most easternly of the two. Pier "A," at its greatest width, is approximately 1000 feet wide. It is wedge-shaped, and is approximately 1400 feet in length. Pier B is about 800 feet in width and 1400 feet in length. On these piers the Terminal Company has erected all needed facilities for said Railway Company for said steamship company, and likewise for all other railway companies and other steamship companies, in so far as they handle, or desire to handle, freight over the piers of the Terminal Company. On these piers it has erected railway tracks, as aforesaid, in order to facilitate the handling of freight between the ships and cars; and on the piers it carries on its wharfage business. To these piers come the ships of the Southern Pacific Company and other ships engaged in coast-wise or trans-oceanic trade. All freight, no matter from what ships or railways, coming over these piers, pays the regular wharfage charge. These piers are the only ones where the Terminal Company carries on its wharfage business or which are operated by it.

The facilities furnished by the Terminal Company and the Galveston Wharf Company for the handling of all freight coming into or departing from the City of Galveston are abundant, among the

best in the land, and the facilities provided as aforesaid by the Terminal Company for the handling expeditiously all traffic tendered it are entirely adequate.

26

XVI.

In the building of Pier B, it was necessary to dredge a slip west of it where ships could berth. Such slip was built 300 feet in width and 1400 feet in length, and excavated to such depth that it could carry a ship drawing twenty-five feet of water, and is known as Slip B. On the west side of said slip, in order that the soil, through the actions of storm and wave, might not drift into the slip and fill it, the Terminal Company erected a bulkhead 1400 feet in length. Westward of said bulkhead about the year 1901 the lands of the Terminal Company were lying idle, useless and not needed by them. About this time, certain contractors doing a jetty work in Galveston Bay, obtained permission from the Terminal Company to erect a trestle west of the bulkhead and place upon it a railway track in order to handle cars hauling rock from the island to be unloaded into barges coming to the end of the trestle near the north end of the bulkhead. The jetty contractors at their own expense built said track, and paid to the Terminal Company fifty cents per car for the movement of the cars over the track. In the year 1905, the jetty contractors had finished their work. The trestle and track had fallen into disrepair. It was of no service to the Terminal Company. That Company derived from it no revenue, and had no use for the lands on which it was situated, which lay idle and brought no revenue to the Terminal Company, but were a source of expense in that it had to pay taxes on them. In that year the said Young approached the officers of the Terminal Company and desired that they would lease to him a certain space west of, and adjoining, the said bulkhead, and would leave thereon and repair the railroad track left by said jetty contractors, and place the leased premises in condition for him to erect thereon machinery for the crushing, handling and sacking of cotton seed cake and meal, which he was engaged in the business of purchasing, selling and exporting. The officers of the Terminal Company believing it would be to its interest to make said lease to said Young, entered into a certain contract with him, by which it leased to

27 him for a term of five years from the first day of July, 1905, and thereafter from year to year until the lease should be terminated in the manner provided by its terms, a dock and warehouse on said property so leased to him and lying north of said bulkhead and to be known and described as "Pier C." Work was to be begun on the construction of the warehouse and dock within thirty days from the time of the signing of the contract, and to be completed with reasonable dispatch. The privilege was granted said Young of placing in the warehouse such machinery and appliances as he might need for storing and handling cotton seed products. The contract was not assignable without the consent of the Terminal Company. The Terminal Company was to furnish him with electric power for operating his machinery, to be adjusted from time to time.

The Terminal Company was to keep the warehouse and docks in reasonable repair, and to maintain sufficient depth of water adjacent to it not to exceed twenty-five feet, to accommodate ocean steamers when loading and unloading at the dock, and to maintain a railroad track on each side of the warehouse suitable for the use of a standard gauge railroad in loading and unloading cars at the dock and warehouse. The expense of the construction of the dock and warehouse was to be borne by the Terminal Company. Said Young was to have control and possession of the dock and warehouse, to operate it entirely at his own expenses in carrying on his business of handling and manufacturing cotton seed products. The Terminal Company was to be released from loss by fire or injuries to employés or others. If the dock and warehouse should be destroyed by fire or other casualty, or so damaged as to be unfit for use, the contract should thereupon terminate, but with option of the Terminal Company to restore the property and continue the lease until the time of its expiration. Young was to pay the Terminal Company a rent of $5,000 per annum in equal monthly installments. He further agreed that he would route all shipments of cotton seed and cotton seed products purchased or shipped by him "over the lines of said Terminal Company and its connection, according to the instructions of said Terminal Company from time to time," and
28 that he would insist upon, and enforce, such routing as might be directed or requested by the Terminal Company except where the enforcement would prevent him from purchasing cotton seed or cotton seed products or from obtaining shipments which were ready to move and for which cars could not be procured by other routing. After the execution of said lease the Terminal Company put said dock or pier in such condition as was called for by said lease. Said Young went into possession of the same, handled his cotton seed products thereon and paid the rent to the Terminal Company. On the ninth day of January, 1906, the contract was amended by a supplemental contract by which the Terminal Company agreed to extend the wharf apron two hundred feet to the south, and to make some further improvements, for which Young agreed to pay an additional rent of $470. On the eleventh day of September, 1906, the former contracts were superseded, or, more accurately speaking, merged in a new contract of that date. By the terms of this contract, as indicated by a blue-print thereto attached and made a part thereof, the Terminal Company agreed to extend said Pier C and make various improvements thereon. While said improvements were being made, said Young was to temporarily use the west side of Pier B. Said Terminal Company did increase the size of said Pier C by making it about 300 feet wide and 1400 feet in length. The lease of said Young was to commence on the first day of November, 1906, and continue for a period of five years. He was to pay the Terminal Company the sum of $15,000 per annum in equal monthly installments. Failure to comply with the terms of the contract by either party in any respect gave the other party the right to terminate it. In other particulars the contract

was substantially the same as the first contract of the tweny-sixth of June, 1905. Said contract of September 11, 1906, is herewith filed, marked "Exhibit A," and made a part hereof.

Under said contract, said Young took possession of said leased pier, and the same has remained under his control and possession to do with as he sees fit, save and except as he should violate the terms of his lease, and is not under the possession or control
29 of the Terminal Company or used by it. As aforesaid, it is not needed by it to furnish terminal facilities for the so-called Southern Pacific Railroad and Steamship Companies, nor needed by it in carrying on its wharfage business, but has been segregated from the lands so used by it and placed as aforesaid under the control of said Young by the lease as aforesaid. The Terminal Company does not handle freight at said pier, and charges neither Young nor any one else wharfage for freight handled thereat. If said Young should pass any freight over Piers A and B, he would pay wharfage charges in the same manner as anyone else. At the pier leased to said Young ships berth, and on them he loads cotton seed meal and cake for export. But the ships of the Southern Pacific Company do not berth there, or receive or discharge freight there for Young or anyone else.

The said Young purchases some meal and cake in the State of Oklahoma, and some at other points outside of the State of Texas, but the great bulk of the meal and cake purchased by said Young and handled by him is purchased in the State of Texas, shipped to him over railways wholly within the State of Texas, on local bills of lading, and delivered to him at Galveston, in the State of Texas, and the carriage of the same to him is, Your Orators aver, intrastate. The cotton seed meal and cake so purchased by him in the State of Texas is handled, treated and sacked by him in Galveston, on Pier C, and at Galveston he takes out his ship's bill of lading. Said bill of lading is for a shipment which he makes from said Pier C there originating and moving entirely by vessel over the high seas to foreign countries not adjacent to the United States towit to various places in the continent of Europe its final destination.

XVII.

The Terminal Company is, as aforesaid, a corporation separate and distinct from, and independent of, the Southern Pacific Company or the Railway Company, but inasmuch as the majority of its corporate stock is owned by the Southern Pacific Company, and inasmuch as the majority of the corporate stock of the railway lines in Texas commonly known as the Southern Pacific Railroad Lines is also owned by the Southern Pacific Company, the Terminal
30 Company deemed it wise and proper to stipulate for the routing of Young's freight as is shown in said contracts.

The true intent and meaning of said stipulation was that said Young should route his freight over the said railway lines. The purpose of this requirement was that in addition to the receipt of its rent by the Terminal Company, the railway companies in which the

Southern Pacific own stock might when said Young was placed at no disadvantage thereby, receive the revenues arising from the carriage of said freight.

XVIII.

Under the contracts above shown the Terminal Company has built and improved Pier C at an expense to it of about $62,560.76. Said Young has erected machinery thereon for the handling and sacking of cake at an expense of $40,000. Said Young has regularly paid the rent of $15,000 per annum to the Terminal Company, and it derives this revenue from a piece of property unused by it and bringing it no revenue until the making of the contracts with said Young, and should said contracts be annulled and abandoned, it will lose this amount paid by said Young, and its investment will be well nigh unavailing and useless.

XIX.

About the — day of September, 1907, one Carl Eichenberg filed his petition before the Interstate Commerce Commission against Southern Pacific Company and the Southern Pacific Terminal Company, in which he made complaint that defendants, by virtue of said arrangement with said Young, by leasing and furnishing him the pier above shown, were violating Section 3, of the Interstate Commerce Act, and giving said Young an unreasonable preference and advantage over his competitors and other persons engaged in the handling, sacking and exporting of cake. No one else was made a defendant to the petition, but later the Interstate Commerce Commission of its own motion made said Railroad Company and sundry other railroad companies parties defendant. At the time of the order hereinafter shown, all the railway companies, except the
31 G. H. & S. A. Ry. Co., were dismissed from the action pending before the Commission, and the order was confined to the Southern Pacific Company, the Terminal Company and the G. H. & S. A. Railway Company. Said Young was never in any way made a party to said proceedings. All the facts above pleaded appear in evidence, and were in substance established and undisputed before the Commission except the facts as to the Menard grant and the title thereunder held by the Terminal Company as shown by deeds, judgments, and conveyances. No question was raised on said hearing as to its title, and no issue was made as to the same.

On to-wit, the twenty-fourth day of June, 1908, the Commission entered its certain order whereby it ordered and directed the defendants, the Southern Pacific Company, the Southern Pacific Terminal Company, the G. H. & S. A. Ry. Co., on or before the first day of September, 1908, and for a period of not less than two years thereafter to abstain from granting and giving to E. H. Young or any other person whatsoever any undue preference or advantage which now accrues to Young through failure of said defendants to exact from said Young payment of wharfage charges for the handling of cotton seed cake and meal over said wharves, docks and piers at Galveston, while at the same time exacting said wharfage charges from other

shippers of cotton seed cake and meal over said wharves, docks and piers; and further ordered said defendants for said time to abstain from giving or allowing to said Young or any person whatsoever for his exclusive use, space on the wharves of said defendants at Galveston for use in the storage and handling of cotton seed meal and cake while contemporaneously refusing and denying similar privileges for the use of said wharves to other shippers of cotton seed meal and cake to shipments of said commodities so offered to said defendants under substantially similar circumstances and conditions. Said order is set forth in words and figures as follows to-wit:

"Order.

32 At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the twenty-fourth day of June, A. D. 1908.

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1277.

CARL EICHENBERG

v.

SOUTHERN PACIFIC COMPANY, SOUTHERN PACIFIC TERMINAL Company; Galveston, Harrisburg & San Antonio Railway Company; Missouri, Kansas & Texas Railway Company of Texas; Galveston, Houston & Henderson Railroad Company of 1882; Gulf, Colorado & Santa Fe Railway Company, and International & Great Northern Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

"It is ordered, that as to the defendants, the Missouri, Kansas & Texas Railway Company of Texas; Galveston, Houston & Henderson Railway Company of 1882; Gulf, Colorado & Santa Fe Railway Company, and International & Great Northern Railroad Company, the complaint herein be, and the same is hereby, dismissed.

"It is further ordered, that the defendants, the Southern Pacific Company, Southern Pacific Terminal Company, and Galves-
33 ton, Harrisburg & San Antonio Railway Company, be, and they are hereby notified and required to cease and desist, on or before the first day of September, 1908, and for a period of not less than two years thereafter abstain from granting and giving to one E. H. Young, a shipper of cotton seed products, through the port of Galveston, Texas, or to any other person whatsoever, undue preferences and advantages which now accrue to said Young through

failure of said defendants to exact from said Young payment of wharfage charges for the handling of cotton seed cake and meal over said wharves, docks, and piers of said defendants at said Galveston while at the same time exacting said wharfage charges from other shippers of cotton seed cake and meal over said wharves, docks and piers.

"It is further ordered, that the defendants, the Southern Pacific Company; Southern Pacific Terminal Company, and the Galveston, Harrisburg & San Antonio Railway Company, be, and they are hereby, notified and required to cease and desist, on or before the first day of September, 1908, and for a period of not less than two years thereafter, abstain from giving or allowing to E. H. Young, or any other person whatsoever, for his exclusive use, space on the wharves of said defendants at said Galveston for use in the storage and handling of cotton seed meal and cake, while contemporaneously refusing and denying similar privileges in connection with said wharves to other shippers of said cotton seed cake and meal whose shipments of said commodities are offered to said defendants under substantially similar circumstances and conditions."

Said order and the opinion of the Commission in said cause of Eichenberg are herewith filed and marked "Exhibit B."

XX.

Your Orators aver, on information and belief, that in said order the Commission has transcended any power given it by law. Your orators say the Commission has extended said order to the mere handling and storing of property on said Pier and embraced in it freight not interstate. The matters complained of in the petition of said Eichenberg, and the sole matters out of which any claim of preference or discrimination accrue, are the contracts above pleaded between the Terminal Company and said Young, and the
34 rights exercised by said Young under said contracts on said Pier C. Your Orators aver that, as above appears, said Pier C has been segregated from the remainder of its property, leased, and under lease set apart to said Young. That it is not a railroad, not a common carrier, or facility or depot for a common carrier, or any appurtenance of a common carrier. Your Orators aver that by its order the Commission has substantially abrogated, annulled, and set at naught said contract and the lease to said Young, has virtually forbidden the use of said pier by him, and has virtually directed the dismantling of said pier and the removal therefrom of the improvements erected thereon by said Young, or the ceasing to use the same, and has forbidden the Terminal Company to lease its said pier or to permit any one to make improvements thereon no matter what revenue the Terminal Company might derive from the same. Your Orators say that in so assuming jurisdiction of said contracts, in so assuming jurisdiction of said pier, and in making said order, said Commission has acted beyond its jurisdiction and without authority.

XXI.

On information and belief, Your Orators aver that said Commission was further in error in the making of their order in that it appears from their opinion thereon that said order was based partly upon the ground that said railway company, said Terminal Company and said Southern Pacific Company had some officers who were officers of at least two of said companies, and that the common ownership of the majority of the stock of the Terminal Company and the said Railway Company was in the Southern Pacific Company; whereas, Your Orators aver on information and belief that such common stock ownership and the having of common officers does not give the Commission the jurisdiction exercised by it nor in any way change the corporate entity of said companies, nor in any way merge one in the other.

XXII.

35 Upon information and belief, Your Orators further say that said order of the Commission is invalid in that, as appears from the opinion, the Commission found or apparently found that if the fee simple title to the lands was in the Terminal Company, it would have the right to enter into the contracts with said Young. Holding the fee simple title not so to be, they held the contracts invalid. Your Orators say, as above pleaded, the title to said lands *were* not in any way placed in issue before said Commission, nor was any chain of title offered in evidence before them, and nothing was offered bearing on the title except the charter, the ordinance of the City of Galveston above referred to, and the said Act of the Legislature ratifying the same. Craving reference to the chain of title, which will be exhibited on the hearing hereof, Your Orators, say the title of the Terminal Company was in truth a fee simple title.

XXIII.

Your Orators further say, on information and belief, that said Commission further transcended its powers in making said order in this, that in making the same they exercised *of* the functions of a court to pass upon and construe the title by virtue of which the Terminal Company held its lands, and by reason of the construction given by them to said title, hold that the Terminal Company could not make the contracts made with said Young and convey to him the privileges conveyed. Upon information and belief, Your Orators say the construction of said title was wrong, and whether right or wrong, the jurisdiction of the Commission could not be exercised according to title by which property was held, but only according as to whether or not that property was held, managed or owned by a common carrier subject to the Act to Regulate Commerce, or used in connection with and as a part of a common carrier's railway or appurtenances in interstate commerce.

XXIV.

Upon information and belief, Your Orators further say said order of the Commission is in contravention of the laws and
36 Constitution of the United States, and especially in contravention of the Fifth Amendment to said Constitution and the part thereof declaring that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation, in that without such process of law and without compensation said order deprives the Terminal Company of its revenues derived from said pier and forbids it to rent, lease, or otherwise make free and unimpeded conveyance or disposition of said pier or any part thereof, as it is entitled to do, and that without Your Orators having had their day in court, it deprives said Young of the right to carry on his business on said pier, nullifies the lease, renders useless his improvements on said pier in a proceeding in which said Young has not been made a party and by which, as Your Orators are informed and believe, cannot be bound; said order thus prevents the Terminal Company from proceeding to fulfill its part of the contract, leaving it to respond to said Young in damages for failure to do so.

XXV.

Upon information and belief, Your Orators further say that if said Act to Regulate Commerce gives, or professes to give, the said Commission power or authority to enter the order above shown, in so far as such authority is given, said Act is in contravention of the Constitution of the United States and especially of Section One, Article One, which provides that all legislative powers herein granted shall be vested in the courts of the United States; and of Section One, Article Three, which provides that the judicial power shall be vested in one Supreme Court and such inferior courts as Congress may from time to time establish; and violates the Constitution of the United States in that, in so far as it authorizes said Commission to make said order, it confers upon the said Commission judicial powers. In said Act, if the Commission is empowered to make said order, Your Orators, on information and belief, aver there is conferred upon the Commission executive, legislative and judicial powers.

37 XXVI.

By reason of the specific grounds set forth in the preceding six paragraphs of this bill, and by reason of the other facts hereinbefore pleaded, Your Orators aver, upon information and belief, that the order of the Commission is null and void, and further aver that if in any respect valid, it is in excess of the authority of the Commission as more fully appears from the facts above pleaded, and further aver that, even if the Commission had power to make such order, it is unnecessary, unreasonable and unjust. Complainant, Southern Pacific Terminal Company, alleges the fact to be that the

execution of said contract with Young, and the erection of said pier, and its occupancy thereunder by him does not now and has never at any time operated as an undue and unreasonable preference or advantage to said Young within the true intent of the Act to Regulate Commerce, or as an undue or unreasonable prejudice or disadvantage, within the meaning of said Act, to said Eichenberg, or any other person; that complainant was and has always been ready and willing to grant to the said Eichenberg, and to all persons similarly situated, all reasonable, fair and equal privileges, with reference to the use of its wharves at Galveston, and to grant to said Eichenberg, and all persons similarly situated, substantially the same rights and privileges acquired by the said Young, and upon substantially the same circumstances and conditions; that said Eichenberg did not at any time in good faith demand, and the Southern Pacific Terminal Company has never at any time refused to extend to him or to any person, substantially the same rights, under substantially the same conditions, as were extended to said Young under said contract; that said Eichenberg did not in good faith desire or intend to procure the same or substantially similar rights and privileges as were acquired by said Young, but his claims and demands in the premises were and are speculative, and for the purpose of laying a predicate for the prosecution of a claim for damages, without foundation in fact, and *complaints* allege the fact to be that said Eichenberg has sustained no damage by reason of said contract with Young and the rights acquired thereunder, and that he has suffered no unjust or unreasonable prejudice or disadvantage within the purpose, meaning or extent of the Act to Regulate Commerce or the several acts amendatory thereof.

XXVII.

Your Orators say the season for handling cotton seed cake and meal is now beginning. If said order is permitted to go into effect, it will prevent said Young from making shipments to and from said pier, and there handling his meal and cake; that the revenues to be derived by the Terminal Company from said Young will cease; that the Terminal Company will be liable to a suit for damages from him; that the shipments of freight by the said Young over said Railway Company will cease or be suspended; that Your Orators will be without any adequate relief at law, and will suffer irreparable damage.

XXVIII.

To the end, therefore, that Your Orators may obtain the relief to which they are entitled in the premises, they now pray:

(1) That upon the filing of this bill, Your Honors will grant all such temporary stays and interlocutory restraining orders suspending the enforcement of the order of the Commission as may be necessary, pending the setting down of this bill on the application for preliminary injunction, and as may be necessary pending the further hearing of the matters of the bill.

(2) That this bill be set down for further hearing on a day cer-

tain to be named by Your Honors, that said Commission and said Young be given notice thereof, and said Commission be called upon to show cause why there should not be granted a preliminary injunction suspending said order, and enjoining them, their
38 officers, agents, servants and representatives from enforcing the same or instituting any suits or taking any proceedings to enforce the same until the final determination of this cause, and that upon such day fixed by Your Honors, or as speedily thereafter as possible, Your Honors grant a preliminary injunction so suspending such order and so enjoining said Commission, its officers, agents, servants and representatives; that said order be in all things enjoined, set aside and held for naught, but that if said order be found in any respects valid, that it be enjoined, suspended and set aside in so far as it in any respect abrogates or modifies the contracts between the Terminal Company and said Young; in so far as it directly or inferentially forbids the Terminal Company to make a lease of Pier C or any part thereof to said Young, or to permit said Young to carry on his business and maintain his machinery thereon; in so far as it directly or inferentially forbids said Young to receive freight thereon or ship it therefrom; in so far as it directly or inferentially commands the Terminal Company not to lease or let to any person any part of Pier C or other part of its wharves not used by it in its business and not permit any person to receive freight thereon, ship freight therefrom or conduct a business thereon, and especially in so far as said order directly or inferentially interferes with the handling by said Young on said wharves of freight or commerce that is wholly confined to the State of Texas; and in so far as it directly or inferentially forbids the handling on said pier of freight or commerce that is not subject to the aforesaid acts to regulate commerce. If any part of said order is found to be valid or binding, Your Orators pray that so much of the same as is in contravention of the powers of the Commission be in all things enjoined, suspended and set aside.

(3) That upon final hearing, said preliminary injunction be made perpetual, and that it be decreed that said order of said Commission shall be forever set aside, annulled and held for naught, and that said Commission, its officers, agents, servants and representatives be forever enjoined from enforcing or taking any steps to enforce the same.

39 (4) That there be granted to Your Orators, process of subpœna to the said E. H. Young and to the said Interstate Commerce Commission, requiring them and each of them to duly appear and answer (but not under oath, the same being expressly waived) the several allegations of this bill.

(5) That if said order of the Commission be not set aside, but sustained, then said contract between the Terminal Company and said Young be cancelled, and said Young be forever enjoined from enforcing the same or in any way interfering with the possession of the Terminal Company in and of Pier C, and be further enjoined from bringing any suit or action against the Terminal Company or any of Your Orators because of anything growing out of or

connected with said contract, or because of, or growing out of, or connected with, said order of the Commission.

(6) Your Orators further pray for such other general and special relief as in equity and good conscience is meet and proper.

SOUTHERN PACIFIC COMPANY,
By WM. HERRIN, *Solicitor.*
SOUTHERN PACIFIC TERMINAL COMPANY,
By BAKER, BOTTS, PARKER AND GARWOOD,
Solicitors.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By BAKER, BOTTS, PARKER AND GARWOOD,
Solicitors.
F. C. DILLARD,
Of Counsel.

STATE OF TEXAS,
County of Harris:

I, W. G. Van Vleck, being duly sworn, say I am Manager of the Southern Pacific Terminal Company, and that I have affixed the seal of said company to the foregoing bill. I further say I have read the foregoing Bill of Complaint, that the allegations therein
40 contained are true except where made upon information and belief, and where so made, I believe them to be true.

[SEAL.] W. G. VAN VLECK, *Manager.*

Sworn to and subscribed before me, E. Gray, a Notary Public in and for the County of Harris and State of Texas, by the said W. G. Van Vleck this the eighth day of August, 1908.

[SEAL.] E. GRAY,
Notary Public in and for Harris County, Texas.

STATE OF TEXAS,
County of Harris:

I, Thornwell Fay, being duly sworn, state that I am the Vice President and General Manager of the Galveston, Harrisburg & San Antonio Railway Company, Complainant in the above entitled and numbered cause, and that I have affixed the seal of said company to the foregoing bill; that I have read the foregoing Bill of Complaint and state that the allegations therein contained are true, except where made upon information and belief, and where so made, I believe them to be true.

[SEAL.] THORNWELL FAY.

Sworn to and subscribed before me, E. Gray, a Notary Public in and for the County of Harris and State of Texas, by the said Thornwell Fay, this the eighth day of August, A. D. 1908.

[SEAL.] E. GRAY,
Notary Public in and for Harris County, Texas.

In the Circuit Court of the United States for the Southern District of Texas, at Galveston.

No. 504. Eq.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
vs.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

On this, the twelfth day of August, 1908, on consideration of the above and foregoing complaint, it is ordered that the same be set down for hearing upon complainant's prayer for temporary
41 injunction against the Interstate Commerce Commission and E. H. Young, defendants, at New Orleans, on the ninth day of November, 1908, before Hon. Don A. Pardee, David D. Shelby, and Andrew P. McCormick, Circuit Judges for the Fifth Circuit.

It is further ordered that the Clerk of the Circuit Court of the United States at Galveston, upon the filing of this bill and order, be, and he is hereby, directed to issue subpœnas directed to the Marshal of the District of Columbia herein, commanding the appearance of the Interstate Commerce Commission by service of said subpœna, together with certified copy of complainant's bill herein, upon Martin A. Knapp, chairman of said Commission, or upon Edward A. Mosely, secretary thereof. And upon the defendant, E. H. Young, filing his answer and cross bill, like process will issue for hearing on same date as original bill.

ANDREW P. McCORMICK,
Circuit Judge Fifth Circuit.

(Indorsements:) No. 504, Equity. Southern Pacific Terminal Co., et al., vs. Interstate Commerce Commission, et al. Bill of Complaint, and Order Thereon. Filed Aug. 13, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

42 Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,
vs.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Answer and Cross-bill of E. H. Young.

(Indorsement:) Equity No. 504, Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company, vs. Interstate Commerce Commission and E. H. Young, Defendants. Cross Bill. Filed August 13, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

43 Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Answer of E. H. Young, Defendant, to the Bill of Complaint of the Southern Pacific Terminal Company, Southern Pacific Company and the Galveston, Harrisburg & San Antonio Railway Company, Complainants.

This defendant, now and at all times hereafter, saves and reserves unto himself the benefit and advantages to except which can, or may be had, or taken to the many errors, uncertainties and other imperfections in the said Bill contained and for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says:

That he admits the truth of the facts set forth in Complainant's bill. This defendant, further answering, says; that he is now and has been for several years past in actual possession of a certain tract of land on Galveston Island, Galveston County, Texas, in the Southern District of Texas, more particularly known and described
44 as Pier "C," holding same under lease, which has not yet expired; that said Pier "C" is located within the bounds of a grant of one league and one labor granted by the Republic of Texas to M. B. Menard, from whom, by mesne conveyances title to a tract containing two hundred acres more or less, and including the site of said Pier "C," passed into and became vested in fee simple in the Southern Pacific Terminal Company. That said Southern Pacific Terminal Company, a corporation organized and existing under the laws of the State of Texas, being the owner in fee simple of the tract before mentioned, constructed thereon two piers, known as Pier A and Pier B, over which commerce is moved from rail to ocean-going vessels, which vessels dock or berth at said Piers A and B; that this defendant entered into contract in writing with said Southern Pacific Terminal Company, owner in fee simple as aforesaid of said tract, whereby said Southern Pacific Terminal Company contracted and agreed to construct on the portion of said tract lying west of Piers A and B, one other pier, now known as Pier C, and lease same to this defendant for a term of years, and, in accordance with said contract, said pier, now known as Pier C, was constructed and possession thereof delivered by the Southern Pacific Terminal Company to this defendant, who, under said contract, pays at this time to said Southern Pacific Terminal Company a rental of $15,000 per annum; that, relying upon his lease as aforesaid, this defendant made valuable improvements on said Pier C, erecting thereon machinery at a cost to himself of more than $40,000.00; such machinery in-

tended to be used and being used continuously since its erection, and still being used by this defendant, for the grinding and sacking of cotton seed meal and cake; that said Southern Pacific Terminal Company is still the owner in fee simple of a large portion of said tract so acquired by it by mesne conveyance under Menard, which is unimproved, and on which no piers have been constructed, but which is adapted to the construction of piers and the berthing of ocean-going vessels, and, should the demands of commerce ever require, said unused portion of said tract is available for the construction of additional piers adequate to furnish dock room
45 far in excess of any present demands of trade.

That the contract of lease entered into between the Southern Pacific Terminal Company and this defendant is a valid and binding contract, and the rights of this defendant thereunder and his right of possession of said Pier C is a valuable property right, exceeding the sum and value of $2000 exclusive of interest and costs; that defendant so being in possession of said Pier C, under said lease conducts thereon a business of buying, selling, receiving, grinding, sacking and loading cotton seed meal and cake; that the larger part of said meal and cake received by this defendant is shipped to him in comparatively small lots from points wholly within the State of Texas on local B/L, and delivered to this defendant at Galveston, Texas, on said Pier C, where said meal and cake is stored, ground and sacked; that a part, though a comparatively small part, of the meal and cake received by this defendant is shipped from points in Louisiana, Arkansas and Oklahoma; that none of the meal and cake loaded and shipped by this defendant from Pier C is consigned to points either directly or indirectly within the United States, but all goes to foreign countries; that the nature of the business of selling cotton seed meal and cake in foreign countries is such as to require same to be ground and sacked, and the only economical way in which this can be done is by having machinery adapted to that purpose installed at the point where said meal and cake is received, and at the point from which same is loaded out to final destination, and to handle same otherwise would be wholly impractical, and would utterly destroy export to foreign countries; that Galveston, where said Pier C is situate, is one of the chief ports of the United States for export of goods to foreign countries, and at said port there are many miles of wharves and piers, many of which are leased to individuals and corporations, and it has become by long usage a custom of the Port of Galveston to permit the leasing of piers to exporters; the rights and privileges of storing and handling freight on many of said piers and wharves is practically the same as the privilege of storing and handling meal and cake enjoyed by this defendant on Pier "C;" That this
46 defendant, so being in possession of Pier "C" and thereon conducting his business as aforesaid, has been notified by said Southern Pacific Terminal Company that there was instituted against said Southern Pacific Terminal Company and others, a proceeding before the Interstate Commerce Commission of the United States, seeking to annul the contract of lease existing between the

Southern Pacific Terminal Company and this defendant; that said Interstate Commerce Commission did on June 24, 1908, enter its order and decree declaring void said contract of lease between Southern Pacific Terminal Company and this defendant; that this defendant was not party in any manner to said proceeding before the Interstate Commerce Commission and is not bound in any manner thereby; that said Interstate Commerce Commission is, and was, wholly without jurisdiction to make and enter any order or decree concerning the property of the Southern Pacific Terminal Company, and especially as to said Pier C, so leased to this defendant for a term of years as aforesaid, and its order and decree of June 24, 1908, are void; that said Interstate Commerce Commission could exercise no jurisdiction, and enter no order or decree, concerning freight handled on said Pier C originating in the State of Texas, and shipped only to Galveston, Texas, and there ground and sacked by this defendant on Pier C, and as to all such meal and cake and as to the right of this defendant so to grind, handle and load same at Pier C the order of the Commission is null and void, being without jurisdiction.

All which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable court shall direct, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

MACO STEWART,
Solicitor for Defendant.

Indorsements: Equity #504. Southern Pacific Terminal Co., Southern Pacific Co., Galveston, Harrisburg & San Antonio Ry. Co. vs. Interstate Com. Com. & E. H. Young, Def'ts. Answer. Filed August 13, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

47 Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Cross-bill.

To the Honorable Judges of the Circuit Court of the United States in and for the Fifth Judicial Circuit and Southern District of Texas, sitting at Galveston:

Now comes E. H. Young, and, having answered Bill of Complainant, he now prays leave to file Cross Bill in the above entitled and numbered cause.

E. H. YOUNG,
By MACO STEWART, *Solicitor.*

48 Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION & E. H. YOUNG, Defendants.

Cross-bill of E. H. Young.

To the Honorable Judges of the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Texas, sitting at ——:

E. H. Young, a resident citizen of the State of Texas, by leave of the Court first had and obtained, brings this, his Cross Bill of Complaint, against Southern Pacific Terminal Company, hereinafter for the sake of convenience called the Terminal Company, a corporation organized and existing under the laws of the State of Texas, thereby a citizen thereof; the Southern Pacific Company, a corporation organized and existing under the laws of the State of Kentucky, and thereby a citizen thereof, of the Galveston, Harrisburg and San Antonio Railway Company, hereinafter for the sake of convenience styled the Railway Company, a corporation organized under
49 and existing by virtue of the laws of the State of Texas, and thereby a citizen thereof, and of the Interstate Commerce Commission, a body corporate, duly organized under and by virtue of an act of Congress dated February 4, 1887, entitled "An Act to Regulate Commerce," and various acts supplementary thereto, hereinafter for the sake of convenience called the Commission, the president of said Southern Pacific Terminal Company being W. G. Van Vleck, resident citizen of Harris County, Texas, the president of the Southern Pacific Company being E. H. Harriman, resident citizen of New York County, New York; the president of the Galveston, Harrisburg & San Antonio Railway Company, being E. H. Harriman, a resident citizen of New York County, New York; and Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis A. Cockrell, Franklin K. Lane, Edgar E. Clark and James S. Harlan, composing the Interstate Commerce Commission, and thereupon on this, his cross bill, said E. H. Young complains and shows unto Your Honors as follows:

A. Complainant's bill herein alleges in substance that the Interstate Commerce Commission, on the petition of one Carl Eichenberg, did, on June 24, 1908, enter its order and decree annulling a certain contract of lease, entered into on September 11, 1906, between the Southern Pacific Terminal Company and E. H. Young, on the ground that same constituted an undue preference and discrimination, and restraining said Company from permitting Young to use the leased premises, known as Pier C, in Galveston Harbor, in the Southern District of Texas; and complainants seek herein

to enjoin said Commission from carrying into effect its said order and decree, and in the alternative pray that if said order and decree be upheld herein, then that this Honorable Court enter its decree declaring null and void the said lease to Young.

I.

The matters and amount involved in this suit exceed the sum of $2000, exclusive of interest and costs. This suit arises under the Constitution and Laws of the United States, as will hereinafter more fully appear.

50 Your orator complains that certain provisions of the Act by virtue of which the Commission made its order, which is hereinafter referred to as well as supplementary provisions of the Order itself, are in contravention to the Constitution of the United States, and Your Orator brings this, his cross bill, under authorization of said Act to regulate Commerce, as well as under general equity powers of this Court.

II.

That one Carl Eichenberg instituted a proceeding before the Interstate Commerce Commission whereby he complained of the Southern Pacific Terminal Company, the Southern Pacific Company and the Galveston, Harrisburg & San Antonio Railway Company, alleging that the lease of said Pier "C" by the Southern Pacific Terminal Company to said E. H. Young constituted the giving of unlawful preference and advantages to said Young, and seeking to annul and cancel the lease from said Terminal Company to said Young under which the latter was in possession of said Pier C, in Galveston; that said Young was not in any manner a party to the said proceedings.

The lease to Young, sought to be cancelled by said proceedings, is of date September 11, 1906, whereby said Terminal Company leased to said Young what is now known as Pier C for five years, beginning November 1, 1906, and, as rental for same, Young agreed to pay $15,000 per annum; that said lease is a valid and subsisting contract between the parties thereto, and is still in full force and effect, though said Commission, on June 24, 1908, made and entered its order in words and figures as follows:

It is further ordered, that the Defendants, the Southern Pacific Company; Southern Pacific Terminal Company and Galveston, Harrisburg and San Antonio Railway Company be, and they are hereby, notified and required to cease and desist, on or before the first day of September, 1908, and for a period of not less than two years thereafter abstain from granting and giving to one E. H. Young, a shipper of cotton seed products, through the port of Galveston, Texas, or to any other person whatsoever, undue pref-

51 erences and advantages which now accrue to said Young through failure of said defendants to exact from said Young payment of wharfage charges for the handling of cotton seed cake and meal over said wharves, docks and piers of said defendant, at said Galveston, while at the same time exacting said wharfage

charges from other shippers of cotton seed cake and meal over said wharves, docks and piers.

It is further ordered, that the defendants, the Southern Pacific Company; Southern Pacific Terminal Company, and the Galveston, Harrisburg and San Antonio Railway Company, be, and they are hereby, notified and required to cease and desist, on or before the first day of September, 1908, and for a period of not less than two years thereafter abstain from giving or allowing to E. H. Young or any other person whatsoever, for his exclusive use, space on the wharves of said defendants at said Galveston for use in the storage and handling of cotton seed meal and cake, while contemporaneously refusing and denying similar privileges in connection with said wharves to other shippers of said cotton seed cake and meal whose shipments of said commodities are offered to said defendants under substantially similar circumstances and conditions.

III.

That the consideration paid by Young for the lease of said Pier C is a valuable and adequate consideration therefor, and to charge Young additional wharfage as is provided in said order of the Commission would be unreasonable.

IV.

That the Terminal Company being the owner in fee simple of a tract of submerged land or flats lying between ordinary high-tide line on Galveston Island and the Channel of Galveston Bay, comprising two hundred acres of land more or less, did lease for a period of years to said Young a certain portion thereof, now known as Pier C, for a fair and valuable consideration, and said Young is now, and has been for several years past, in possession of said Pier C under said lease, which does not expire until *on* or about the year 1911, and on said Pier C said Young has erected valuable improvements, at a cost to himself of more than $40,000, and on
52 said Pier C said Young now has valuable machinery, used in the sacking and grinding of cake and cotton seed meal, of which he is now, and has been for several years past, a large exporter to foreign countries, loading same from Pier C to ocean-going vessels there berthed; that all said meal and cake so loaded by Young at Pier C is exported to foreign countries, not adjacent to the United States and no part thereof to any portion of the United States.

V.

That said Young, so being in possession of said Pier C, and conducting his business of grinding and sacking meal and cake, has been notified to remove his machinery therefrom and surrender to the Terminal Company possession of said pier though the lease to said Young is a valid and subsisting lease and has not yet expired; that said Terminal Company threatens to remove said Young therefrom by reason of the fact that the Interstate Commerce Commis-

sion did, on June 24, 1908, enter its order and decree declaring null and cancelled and void the contract of lease between said Terminal Company and said Young; and said Terminal Company is now demanding possession of said premises from said Young, and threatens to remove him therefrom, and said Commission, by its order and decree as aforesaid, in attempting to invalidate and declare void the contract between said Terminal Company and said Young, is seeking to deprive said Young of his property without due process of law, his right to said Pier C and the use and occupancy thereof being a property right in the sum and value of more than $2000, exclusive of interest and costs.

VI.

That the greater part of the cotton seed meal and cake forwarded to Young is consigned to him at Pier C, at Galveston, on local B/L from points within the State of Texas, and thereby not interstate commerce.

VII.

That a portion of the meal and cake ground by Young at Pier C, and from there loaded and exported to foreign countries,
53 is shipped to said Young from points without the State of Texas, to-wit: Louisiana, Arkansas and Oklahoma.

VIII.

That the Terminal Company owns two certain other piers fronting on the channel of Galveston Bay, known as Pier A and Pier B, on which foreign commerce as well as interstate commerce is handled, and said Piers A and B are sufficient and adequate for the accommodation of all goods tendered said Terminal Company, and said piers, A and B, are sufficient and adequate for commerce.

IX.

That the site of Pier C at the time same was first leased by said Terminal Company to defendant Young was a mud flat, covered with water at ordinary high tide and exposed at low tide, and said site was not in use for any purpose of commerce.

X.

That for a valuable consideration it thereunto moving said Terminal Company did construct Pier C and lease and deliver same over to Young.

XI.

That said Terminal Company is still the owner in fee simple of more than one hundred and fifty acres of flats lying between the line of ordinary high tide on Galveston Island and the channel of Galveston Bay, on which piers similar to Piers A, B, and C can be at any time constructed, but at this time the demand of commerce

is not sufficient to justify the construction of piers on said flats, and, if piers were so constructed thereon, there would be no use whatever made thereof, and there is at this time not sufficient freight passing through the Port of Galveston to require the use of additional piers or docks to those now existing.

XII.

That through said Port of Galveston there is a large ex-
54 change of out-bound and inward-bound freight, all which freight passes and is handled on the docks of the Galveston Wharf Company and on Piers A and B, of the Terminal Company, except such meal and cake as is handled by Young over said Pier C.

XIII.

That the handling of freight, both in and out bound at the Port of Galveston, is by vessels of deep draft, reaching the docks and wharves through the channel of Galveston Harbor.

XIV.

That said channel of Galveston Harbor has been from time to time lengthened as the demands of commerce required.

XV.

That at this time the wharves along the channel at said port of Galveston extend from east to west for a distance of approximately four miles, and all said docks and piers, except Piers A, B and C, before mentioned, are owned by the Galveston Wharf Company.

That said Galveston Wharf Company has conducted wharfage business at the Port of Galveston for many years past, and, by long usage, a custom has been established of concentrating freight on different wharves turned over to various individuals and corporations.

That the piers or docks of the Galveston Wharf Company are numbered consecutively from east to west. Pier 10 being on the extreme east end of the Wharf Company property, and the piers extend west to about 39. Such piers or docks are covered with sheds substantially similar to the shed covering Pier C.

That Pier 10 is leased by the said Galveston Wharf Company to Wm. Parr & Company. Pier No. 12 is leased to J. H. Langbehn. That a portion of Pier 19 is leased and occupied by a building used exclusively by the Gulf and Interstate R. R. Co.; that another portion of Pier 19 is occupied by a building used exclusively by W. J. Chapman for the conduct of a boat and fishing business; that a portion of Pier 20 is occupied exclusively by a pumping plant
55 of the Galveston Electric Company, and another portion of Pier 20, or a part of the pier immediately adjoining Pier 20, is occupied by elevator connected with the Star Flour Mills; that a portion of Pier 22 is used and occupied exclusively by the Gulf

Fisheries Company for the handling of boats, fish and ice; that several hundred yards of said wharf, extending from 23 to 27, is exclusively occupied by a building used and occupied by a line of steamers ordinarily known as the Mallory Line, and there the ships of said line berth and load and unload, and the cargo for such ships is assembled and held awaiting final disposition. That Piers 29 to 33 are leased by a corporation on which it has constructed what is known as the Moody Compress, and in which building valuable machinery is contained for the compressing of cotton, and this portion of the Wharf Company's property is used exclusively by said press. That a portion of Pier 29 is leased to an elevator company which there operates an elevator constructed by the Galveston Wharf Company, paying therefor (as Young is informed and believes, and, being so informed and believing, charges,) an annual rental. That Pier 34 is leased to the firm of Fowler & McVitie, coal dealers, at Galveston, Texas, and on said pier said firm has located and maintains a coal elevator, and has maintained same for many years past, and said firm has the exclusive use of said pier for said purpose.

That a large portion of the property of said Galveston Wharf Company is leased to the International Creosote Company, which company has erected thereon enormous steel tanks thereby having the exclusive use of that portion of the said Galveston Wharf property; that Pier 38 of said Galveston Wharf Company is leased to the New Orleans Export Company, which company has there erected machinery for the grinding and sacking of cake and meal similar to the machinery operated by Young on Pier C, and that portion of said pier on which said New Orleans Export Company has erected its machinery occupied by it exclusively.

XVI.

That in the conduct of business at the said port of Gal-
56 veston it is necessary that exporters be given the right to concentrate freight intended for export on said docks and at a point convenient for loading on vessels berthed at said docks; that to prohibit concentration of cargoes on said docks would absolutely destroy commerce of this port, as handling charges on freight would otherwise be absolutely prohibitive.

XVII.

That the shipping of cotton seed meal and cake to foreign countries is a large factor in the foreign commerce of this country, and the successful handling of same requires the use of dock room on which to concentrate cargoes and requires the use of sufficient space on the docks convenient to loading for the location, erection and operation of machinery to grind and sack said meal and cake.

XVIII.

That the leasing of said piers at the Port of Galveston by exporters is a reasonable and proper custom, and is in no wise inimical to the interests of commerce.

XIX.

That the order and decree of the Interstate Commerce Commission, entered on June 24, 1908, in so far as it attempts to prohibit the right of said Young to operate his machinery on said Pier C, and in so far as it attempts to prohibit his concentrating cargo on Pier C, and in so far as it attempts to prohibit the loading of cargo by Young at Pier C, is not a regulation of commerce, but is a prohibition of commerce, and enforcing such order will destroy the business of said Young, will render useless the machinery so erected by him on said Pier C, and will render said pier absolutely worthless for any purpose whatsoever.

XX.

That if the right to use said Pier C in the manner that said Young *be* now using same, under his said lease, be declared a discrimination in his favor, and therefore he be prohibited from using same,
57 then there will exist at this port of Galveston a discrimination and preference to any and all other persons and corporations engaged in the export business in that many of the docks and piers as hereinbefore recited are leased and used exclusively by corporations and individuals, and particularly is Pier 38 used by the New Orleans Export Company, a competitor of said Young, and should the same rule be applied to all piers of the Galveston Wharf Company as is laid down by the Commission for said Pier C, then all said piers of the Galveston Wharf Company must be abandoned for the purpose for which same are now used as hereinbefore recited, and thereby the Port of Galveston be utterly destroyed.

XXI.

That along the north side of the channel in Galveston Harbor, for a distance of several miles, there is what is known as Pelican Flats, such flats being owned in fee simple by the City of Galveston, a municipal corporation; that piers similar to Pier C could be constructed along said flats for shipping purposes; that but a small portion of said flats are being used, to-wit: about one hundred feet of the front thereof by the Galveston Boat and Yacht Club, whereon is constructed a permanent building, under authority from the City of Galveston, and a portion thereof being used by one Bloodworthy as a ship yard for the repair of small vessels, and should the demands of commerce ever require piers in addition to those now in use, such additional piers could be constructed, not only on the remaining property of the Terminal Company, but also on Pelican Flats in front of the City of Galveston, and fronting on the Galveston Channel.

XXII.

Said Interstate Commerce Commission, by its decree of June 24, 1908, held that the Southern Pacific Terminal Company and the Southern Pacific Company and the Galveston, Harrisburg and San Antonio Railway Company are to be treated as one corporation be-

cause of the fact that the Southern Pacific Terminal Com-
58 pany is the owner and holder of the majority of the stock in the other two corporations.

XXIII.

That said Young in good faith entered into the contract of lease with the said Terminal Company, paying therefor a valuable and adequate consideration, and expended large sums of money in equipping said Pier C for the purpose of his business, which facts were known by the officers and agents of the Southern Pacific Terminal Company and the officers and agents of the Southern Pacific Company and the officers and agents of the Galveston, Harrisburg and San Antonio Railway Company, and, though they were aware of the fact that said Young so paid a large consideration for said lease, and so made valuable improvements and expended large sums of money in and about the equipment of said Pier C for the conduct of his business, and knew that Young was engaging in contracts involving him in large amounts based on his rights to the use of said pier, neither said Galveston Harrisburg and San Antonio Railway Company nor said Southern Pacific Company or any of their officers, or agents thereof interposed in, and objected to, the acts of said Young, nor did they or any of them advise him of the rights, if any, they had in said Southern Pacific Terminal Company but said Young, relying on his said contract with said Terminal Company, and believing said Company to be the owner in fee simple of said property, and relying upon title of record and actual possession being in said Terminal Company, and being wholly ignorant of any rights, if any, of said Southern Pacific Company and the Galveston, Harrisburg and San Antonio Railway Company, made said advances, payments, improvements and contracts, and said Galveston, Harrisburg & San Antonio Railway Company and said Southern Pacific Company are estopped as against said Young from claiming any right or interest in said Southern Pacific Terminal Company, and said Young is entitled, by reason of the premises, to be protected in his right to the use of Pier C under said Terminal Company for the full term of his lease. Said Young alleges further
that said Commission was without jurisdiction to make and
59 enter order of June 24, 1908, and that said Commission is without jurisdiction whatever over said property or over said Young and his business, and that said Commission has no jurisdiction over any part of the business of said Young originating and terminating in Texas, and has no jurisdiction over or right to determine the question as to Young's right to use and occupy the property situated wholly in the State of Texas and owned in fee simple by the Terminal Company; that said Commission threatens to put into effect its said order and decree on September 1, 1908, and said Terminal Company threatens to remove said Young from said premises on said date.

That Young further shows that his said lease with said Terminal Company is a valid and subsisting contract, and that he has no power or control over said Terminal Company to regulate its wharf-

age charges, but he says that the consideration paid by him for the use of said Pier C is adequate, sufficient and reasonable, and further that said Terminal Company is possessed of sufficient unused and unoccupied property susceptible to being converted into piers similar to Pier "C" to accommodate the existing cotton seed business of the United States.

XXIV.

That Galveston Wharf Company owns several miles of track on its wharves. It also owns switch engines. With these engines and over its own tracks it hauls freight back and forth between the railways and ships engaged in interstate commerce, thereby furnishing terminal facilities between railways and ships for such commerce.

XXV.

At least one industry permanently established on the property of the Galveston Wharf Company, and which is engaged in the export and handling of grain coming into Galveston by railway, obtains its privileges on the property of the Galveston Wharf Company for a flat rental and pays no wharfage in addition thereto.

60 XXVI.

Your Orator has no adequate remedy at law, and unless restraining order and injunction hereinafter prayed for be issued, he will suffer irreparable injury.

Wherefore, said E. H. Young now prays that Your Honors will grant all such temporary stays and restraining orders to suspend said order of the Interstate Commerce Commission as may be necessary pending the setting down of this Application and further hearing hereof, and that this Cross Bill be set for hearing on some day certain, and that all other parties hereto, viz: said Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg and San Antonio Railway Company and the Interstate Commerce Commission be notified and called on to show cause why the Interstate Commerce Commission, its officers, servants, agents and representatives be not enjoined from enforcing its said Order and Decree of June 24, 1908, and further that Preliminary Injunction be granted, suspending the Order of the Interstate Commerce Commission and enjoining said Interstate Commerce Commission, its officers, servants, agents and representatives from interfering with said Young in his business on said Pier "C," and on final hearing that the Preliminary Injunction be made perpetual, and the Order restraining said Interstate Commerce Commission from in any manner interfering with the rights of said Young to the use and possession of said Pier "C" be made perpetual, and that said Interstate Commerce Commission be forever enjoined, and that process of subpœna be granted to the Interstate Commerce Commission and to the Southern Pacific Terminal Company and to the Southern Pacific Company and to the Galveston, Harrisburg and San An-

tonio Railway Company, requiring them and each of them to answer (but not under oath, answer under oath being expressly waived) the allegations hereof; and pleading in the alternative, said Young prays that the said Terminal Company be required to furnish to other shippers of cotton seed cake and meal, whose shipments are offered under substantially similar circumstances and conditions, piers at Galveston, Texas, similar to said Pier "C," and fur-
61 ther that said Terminal Company be restrained and enjoined from making any wharfage charges against other shippers of cotton seed cake and meal other and different from the rental charges paid by said Young for said Pier "C," and said Young prays for such other, further and general relief as he may be entitled to in law and equity.

E. H. YOUNG,
By MACO STEWART, *Solicitor.*

THE STATE OF TEXAS,
County of Galveston:

E. H. Young, being duly sworn, says: I am the identical E. H. Young named in the foregoing Cross Bill, and have read same, and the allegations therein are true except where made on information and belief, and as to such allegations, made on information and belief, I believe same to be true.

E. H. YOUNG.

Sworn to and subscribed by E. H. Young before me and given under my hand and seal of office this twelfth day of August, A. D. 1908.

[SEAL.]

W. C. MORRIS,
Notary Public in and for Galveston County, Texas.

(Indorsement:) Equity No. 504, Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company, vs. Interstate Commerce Commission and E. H. Young, Defendants. Cross Bill. Filed August 13, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

62 *Subpœna in Chancery for Interstate Commerce Commission on Original Bill, Issued August 13, 1908, with Marshal's Return Thereon.*

UNITED STATES OF AMERICA:

Circuit Court, Fifth Circuit and Southern District of Texas.

The President of the United States of America to Interstate Commerce Commission, Greeting:

You are hereby commanded to appear personally before the Honorable Circuit Court of the United States, for the Southern District

of Texas, in the Fifth Circuit, at a Court to be holden at the City of Galveston, in and for said Circuit, on the first Monday of October next, or whensoever the said Court shall be there, to answer a Bill exhibited against you and E. H. Young, by Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company, filed August 13, 1908, and to do further and receive what the said court shall have considered in that behalf. And this *that* you are not to omit under the penalty of Two Hundred and Fifty Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, and the Seal of the Circuit Court of the United States, for the Southern District of Texas, at the City of Galveston, this 13th day of August, Nineteen Hundred and eight and of the Independence of the United States of America the 133rd year.

C. DART,
Clerk U. S. Circuit Court,
Southern District of Texas,
[SEAL.] By G. PREDECKI, *Deputy.*

The Defendant Interstate Commerce Commission is required to enter its appearance in the above suit in the Clerk's Office on or before the first Monday of October next, otherwise the Bill will be taken as confessed.

C. DART,
Clerk U. S. Circuit Court,
Southern District of Texas,
By G. PREDECKI, *Deputy.*

Directions to Marshal.

The Bill alleges that the defendant is a resident of the District of Columbia, in the City of Washington, of which Martin A.
63 Knapp is the Chairman and Edward A. Mosely is Secretary.

Marshal's Return.

Served copies of the bill of complaint and order in the cause and copy of the within subpœna on Interstate Commerce Commission, by service on Edward A. Moseley its Secretary Sept. 16, 1908.

AULICK PALMER,
U. S. Marshal for Dist. of Columbia.
B.

(Indorsement:) United States Circuit Court, Southern District of Texas. Ch. No. 504. Southern Pacific Terminal Company et al vs. Interstate Commerce Commission et al. Subpœna in Chancery. Issued August 13, 1908; Returnable October Rules, 1908. C. Dart, Clerk, By G. Predecki, Deputy. Returned and filed 28th day of September, A. D. 1908. C. Dart, Clerk, By G. Predecki, Deputy.

64 *Subpœna in Chancery for Interstate Commerce Commission on Cross-bill Filed by E. H. Young, Issued August 13, 1908, with Marshal's Return Thereon.*

UNITED STATES OF AMERICA:

Circuit Court, Fifth Circuit and Southern District of Texas.

The President of the United States of America to Interstate Commerce Commission, Greeting:

You are hereby commanded to appear personally before the Honorable Circuit Court of the United States for the Southern District of Texas, in the Fifth Circuit, at a Court to be holden at the City of Galveston, in and for said Circuit, on the first Monday of October next, or whensoever the said Court shall be there, to answer a Cross Bill exhibited against you and Southern Pacific Terminal—, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company, by E. H. Young, filed August 13, 1908, and to do further and receive what the said court shall have considered in that behalf. And this *that* you are not to omit under the penalty of Two Hundred and Fifty Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, and the Seal of the Circuit Court of the United States, for the Southern District of Texas, at the City of Galveston, this 13th day of August, Nineteen Hundred and eight and of the Independence of the United States of America the 133rd year.

C. DART,
Clerk U. S. Circuit Court,
Southern District of Texas,
By G. PREDECKI, *Deputy.*

[SEAL.]

The Defendant Interstate Commerce Commission is required to enter its appearance in the above suit in the Clerk's Office on or before the first Monday of October next, otherwise the Bill will be taken as confessed.

C. DART,
Clerk U. S. Circuit Court,
Southern District of Texas,
By G. PREDECKI, *Deputy.*

Directions to Marshal.

The Bill alleges that the defendant is a resident of the City of Washington, in the District of Columbia, of which Martin A.
65 Knapp is the Chairman, and Edward A. Mosely, is Secretary.

Marshal's Return.

Served copy of within subpœna on Interstate Commerce Commission by service on Edward A. Moseley its Secretary Sept. 16, 1908.

AULICK PALMER,
U. S. Marshal, District of Columbia.

(Indorsements:) United States Circuit Court, Southern District of Texas. Ch. No. 504. Southern Pacific Terminal Company et al. vs. Interstate Commerce Commission et al. Subpœna in Chancery. Issued August 13, 1908. Returnable October Rules, 1908. C. Dart, Clerk, By G. Predecki, Deputy. Returned and filed 28th day of September, A. D. 1908. C. Dart, Clerk, By G. Predecki, Deputy.

66 *Writ to Serve Copy on Interstate Commerce Commission of Certified Copy of Original Bill of Complaint and Copy of Order Thereon, Dated 12th Day of August, 1908, Issued August 13, 1908, with Marshal's Return Thereon.*

UNITED STATES OF AMERICA,
Southern District of Texas:

In United States Circuit Court, at Galveston.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
v.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

The President of the United States to the Marshal of the District of Columbia, Greeting:

You are hereby commanded to serve Interstate Commerce Commission, by service upon Martin A. Knapp, Chairman of said Commission, or upon Edward A. Mosely, Secretary thereof, with the accompanying certified copy of Bill of Complaint, and copy of the order of the Hon. A. P. McCormick, U. S. Circuit Judge thereon, dated 12th day of August, 1908, said Bill of Complaint, and order filed 13th day of August, 1908.

Herein fail not, and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, and the seal of the Circuit Court of the United States for the Southern District of Texas, at Galveston, this 13th day of August, A. D. 1908.

C. DART,
Clerk U. S. Circuit Court, S. D. T.,
[SEAL.] By G. PREDECKI, *Deputy.*

Marshal's Return.

Received this writ on the — day of September, 1908, and executed the same on the 16th day of September 1908 by delivering to Edward A. Moseley, Secretary of the Interstate Commerce Commission in person, at Washington City in my District, the accompanying copy of the within mentioned Bill of Complaint and order certified by the Clerk of this Court.

AULICK PALMER,
U. S. Marshal, District of Columbia.

(Indorsements:) United States Circuit Court, Southern District of Texas. No. 504. Equity. Southern Pacific Terminal Company et al. v. Interstate Commerce Commission et al. Writ to
67 serve copy. Issued August 13th, 1908. C. Dart, Clerk, By G. Predecki, Deputy. Returned and filed 28th day of September, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

68 *Writ to Serve Copy on Interstate Commerce Commission of Answer and Cross-bill of E. H. Young, Issued August 13, 1908, with Marshal's Return Thereon.*

UNITED STATES OF AMERICA,
Southern District of Texas:

In United States Circuit Court, at Galveston.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
v.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

The President of the United States to the Marshal of the District of Columbia, Greeting:

You are hereby commanded to serve Interstate Commerce Commission, by service upon Martin A. Knapp, Chairman of said Commission, or upon Edward A. Mosely, Secretary thereof, with the accompanying certified copy of Answer and Cross-bill of E. H. Young, filed 13th day of August, 1908.

Herein fail not, and due return of this writ make.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, and the seal of the Circuit Court of the United States for the Southern District of Texas, at Galveston, this 13th day of August, A. D. 1908.

C. DART,
Clerk U. S. Circuit Court, S. D. T.,
[SEAL.] By G. PREDECKI, *Deputy.*

Marshal's Return.

Received this writ on the — day of September 1908 and executed the same on the 16th day of September 1908 by delivering to Edward A. Moseley, Secretary of the Interstate Commerce Commission in person, at Washington City in my District, the accompanying copy of the within mentioned answer and cross-bill certified by the Clerk of this Court.

AULICK PALMER,
U. S. Marshal, District of Columbia.

(Indorsements:) United States Circuit Court, Southern District of Texas. No. 504, Equity. Southern Pacific Terminal Company et al. v. Interstate Commerce Commission et al. Writ to serve copy. Issued August 13, 1908. C. Dart, Clerk, By G. Predecki, Deputy. Returned and filed 28th day of September, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

69 *Certificate of Attorney General Made for the Purpose of Expediting the Trial of the Said Cause.*

Filed Sept. 11, 1908.

In the Circuit Court of the United States for the Southern District of Texas.

SOUTHERN PACIFIC COMPANY, SOUTHERN PACIFIC TERMINAL COMPANY, and Galveston, Harrisburg & San Antonio Railway Company,

v.

THE INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

To the Clerk of said Court:

I hereby certify that the above entitled cause now pending in said court is a suit in equity brought by the Southern Pacific Company, Southern Pacific Terminal Company, and Galveston, Harrisburg & San Antonio Railway Company against the Interstate Commerce Commission and E. H. Young, under the act of Congress entitled "An Act to regulate commerce", as amended by the act of June 29, 1906, and that said suit is in my opinion a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903; and in further compliance with the provisions contained in Section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file this certificate among the records of the above entitled cause, and immediately furnish a copy thereof to each of the Circuit Judges of the Fifth Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the Circuit Judges of said Circuit, as is provided by the said Act of February 11, 1903.

CHARLES J. BONAPARTE,
Attorney General.

Washington, D. C., August 29, 1908.

70 (Indorsements:) No. 504, Equity. Southern Pacific Company et al. vs. The Interstate Commerce Commission et al. Certificate of Attorney General made for the purpose of expediting the trial of the said cause. Filed Sept. 11, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

71 *Appearance of Southern Pacific Company, Southern Pacific Terminal Company, and Galveston, Harrisburg & San Antonio Railway Company to Cross-bill of E. H. Young.*

Filed Sept. 25, 1908.

In the Circuit Court of the United States for the Southern District of Texas, at Galveston.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Company,

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

Appearance to *Costs* Bill of E. H. Young.

To C. Dart, Clerk Circuit Court United States for the Southern District of Texas, at Galveston:

We waive the issues of citation on the cross bill filed herein by E. H. Young and enter appearance for the Southern Pacific Company, Southern Pacific Terminal Company and Galveston, Harrisburg & San Antonio Railway Company, defendants in said cross bill, and complainants in the original bill filed herein.

SOUTHERN PACIFIC COMPANY,
By WM. HERRIN, *Solicitor.*
SOUTHERN PACIFIC TERMINAL COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.
GALVESTON, HARISBURG & SAN ANTONIO RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.

F. C. DILLARD,
Of Counsel.

(Indorsements:) No. 504, Eq. Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company vs. Interstate Commerce Commission and E. H. Young. In the Circuit Court of the United States for the Southern District of Texas at Galveston. No. 504, Equity. Appearance of Southern Pacific Company, Southern Pacific Terminal Company and Galveston, Harrisburg & San Antonio Railway Company to Cross Bill of E. H. Young. Filed Sept. 25, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

72 *Answer of Southern Pacific Company, Southern Pacific Terminal Company and Galveston, Harrisburg & San Antonio Railway Company to Cross-bill of E. H. Young.*

Filed Sept. 25, 1908.

In the Circuit Court of the United States for the Southern District of Texas, at Galveston.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC Company, Galveston, Harrisburg & San Antonio Railway Company,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

The Joint Answer of the Southern Pacific Company, Southern Pacific Terminal Company and Galveston, Harrisburg & San Antonio Railway Company to the Cross-bill of E. H. Young, Cross-complainant.

These defendants, Southern Pacific Company, Southern Pacific Terminal Company and Galveston, Harrisburg & San Antonio Railway Company, respectively, now and at all times hereafter, saving to themselves any and all manner of benefit or advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, say that they and each of them are strangers to all and singular the matters and things in the said cross bill of complaint contained, and therefore leaves the cross complainant, E. H. Young, to make such proof thereof as he shall be able to produce herein, and these defendants and each of them deny any and all manner of unlawful combination and confederacy wherewith they or either of them is by the said cross bill of complaint charged without this, that there is any other matter, cause or thing in the said cross complainant's said cross bill contained, material or necessary for this defendant to make answer unto, and not herein or hereby, well and sufficiently answered, confessed, traversed and evaded or denied, it is true to the knowledge or belief of these cross defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

SOUTHERN PACIFIC COMPANY,
By WM. HERRIN, *Solicitor.*

73 SOUTHERN PACIFIC TERMINAL COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.

F. C. DILLARD,
Of Counsel.

(Indorsements:) No. 504. Equity. Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company, vs. Interstate Commerce Commission and E. H. Young. In the Circuit Court of the United States for the Southern District of Texas at Galveston. No. 504 Equity. Answer of Southern Pacific Company, Southern Pacific Terminal Company, and Galveston, Harrisburg & San Antonio Railway Company to Cross Bill of E. H. Young. Filed Sept. 25, 1908. C. Dart, Clerk. By G. Predecki, Deputy.

74 *Replication of Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company to Answer of E. H. Young.*

Filed Sept. 25, 1908.

In the Circuit Court of the United States for the Southern District of Texas, at Galveston.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC Company, Galveston, Harrisburg & San Antonio Ry. Company,
vs.
INTERSTATE COMMERCE COMMISSION & E. H. YOUNG.

Replication of Above-named Plaintiffs to the Answer of E. H. Young.

These replicants, Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, saving and reserving to themselves all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, E. H. Young, for replication thereunto, say that they and each of them do and will ever maintain and prove their said bill to be true, certain and sufficient in the law, to be answered unto by the said defendant, and that the answer of said defendant, E. H. Young, is very uncertain, evasive and insufficient in the law, to be replied unto by these replicants; without that, that in other matter or thing in the said answer contained, material or effectual in the law, to be replied unto, confessed or evaded, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly, as in and by their said bill herein they have already prayed.

SOUTHERN PACIFIC COMPANY,
By WM. HERRIN, *Solicitor.*
SOUTHERN PACIFIC TERMINAL COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.

F. C. DILLARD,
Of Counsel.

(Indorsements:) No. 504, Eq. Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg
75 & San Antonio Railway Company vs. Interstate Commerce Commission and E. H. Young. In the Circuit Court of the United States for the Southern District of Texas at Galveston. No. 504 Equity. Replication of Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, to Answer of E. H. Young. Filed Sept. 25, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

76 *Amendment to Bill of Complaint.*

Filed Oct. 27, 1908.

Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Amendment to Bill of Complaint.

To the Honorable the Judges of the Circuit Court in and for the Fifth Circuit in Southern District of Texas:

Now come the complainants, Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Co. and file this, their amendment to their Bill of Complaint and amend Paragraph XIX thereof by adding the following:

Since the making of the above shown order the effective date of same has been extended so that the same will not become effective until the fifteenth day of November, 1908. They say that unless the same is enjoined, set aside or suspended by this Court, or the Honorable Judges thereof, it will become effective on said date; that all revenue derived by the Terminal Company from the property involved in the order will thereupon cease; that irreparable injury will thus be done all complainants and especially the Terminal Company; that said order is a confiscation of so much of the property of the Terminal Company and the revenues therefrom as are involved in said order, and deprives it of its property without any judicial investigation and without due process of law.

SOUTHERN PACIFIC COMPANY,
By W. F. HERRIN, *Solicitor.*
SOUTHERN PACIFIC TERMINAL COMPANY.
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.

77 GALVESTON, HARRISBURG & SAN ANTONIO RY. CO.,
By BAKER, BOTTS, PARKER & GARWOOD,
Solicitors.

F. C. DILLARD,
Of Counsel.

Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Affidavit of G. R. Cottingham, Secretary of Southern Pacific Terminal Company.

I, G. R. Cottingham, state on oath that I am the secretary of the Southern Pacific Terminal Company complainant herein and as such am authorized to make this affidavit and attach the seal of the said company thereto, that I have read and am cognizant of the allegations of the amendment to the bill of complaint to which this affidavit is attached and that they and each of them are true.

G. R. COTTINGHAM.

(Seal of Southern Pacific Terminal Company.)

STATE OF TEXAS,
County of Harris:

This day personally appeared before me the undersigned authority, G. R. Cottingham, known to me to be the person whose name is subscribed to the foregoing affidavit and being duly sworn, stated, that the matters and things therein set forth are true.

Given under my hand and seal of office this the 26th day of October, A. D. 1908.

JNO. H. McCLUNG,
Notary Public Within and for
[SEAL] *Harris County, Texas.*

(Indorsements:) No. 504, Equity. Southern Pacific Terminal Co., Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company, Complainants vs. Interstate Commerce Commission and E. H. Young, Defendants. Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In
78 Equity. Amendment to bill of complaint. Filed Oct. 27, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

79 *Replication of E. H. Young to Plaintiffs' Answer to Deft. Young's Cross-bill.*

Filed Nov. 6, 1908.

In the Circuit Court of the United States for the Southern District of Texas, at Galveston. No. 504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Ry. Company,

vs.

INTERSTATE COMMERCE COMMISSION & E. H. YOUNG.

Replication of E. H. Young to the Answer of Southern Pacific Company, Southern Pacific Terminal Company and the Galveston, Harrisburg & San Antonio Railway Company to Cross-bill of E. H. Young.

This replicant, E. H. Young, saving and reserving to himself all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg and San Antonio Railway Company to the cross bill of defendant, E. H. Young, for replication thereunto, says that he does and will ever maintain and prove his said cross bill to be true, certain and sufficient in the law, to be answered unto by the said Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg and San Antonio Railway Company, and that the answer of said Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg and San Antonio Railway Company is very uncertain, evasive and insufficient in the law, to be replied unto by this replicant: without that, that in other matter or thing in the said answer contained, material or effectual in the law, to be replied unto, confessed or evaded, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this honorable Court shall direct, and humbly, as in and by his said bill herein he has already prayed.

E. H. YOUNG,
By MACO STEWART, *Solicitor.*

(Indorsements:) No. 504 Eq. Southern Pacific Terminal Co. Southern Pacific Co. G. H. & S. A. Ry. Co. vs. Interstate Commerce Commission and E. H. Young. In Circuit Court of the United States for the Southern Dist. of Texas, at Galveston. Replication of E. H. Young to Plaintiffs' answer to Deft. Young's Cross bill. Filed
80 Nov. 6, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

81 *Entry of Appearance of Messrs. Walter & Terriberry, as Solicitor- and of Counsel for Interstate Commerce Commission.*

Filed Nov. 16, 1908.

In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

To the Clerk of said Court:

Please enter my appearance as solicitor for the Interstate Commerce Commission, defendant in the above entitled cause.

LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission,
Defendant.

New Orleans, Nov. 9, 1908.

To the Clerk of said Court:

Please enter my appearance as of counsel for the Interstate Commerce Commission, defendant in the above entitled cause.

GEO. H. TERRIBERRY,
Of Counsel for Interstate Commerce Commission,
Defendant.

New Orleans, Nov. 9, 1908.

(Indorsements:) Equity No. 504. Southern Pacific Terminal Co., et al. vs. Interstate Commerce Commission, et al. Entry of appearance of Messrs. Walter & Terriberry, as solicitor-, and of counsel, for Interstate Commerce Commission. Filed Nov. 16, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

82 *Demurrer to Bill by Def't, Int. Com. Com.*

Filed Nov. 16, 1908.

In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Demurrer.

The Demurrer of the Interstate Commerce Commission, One of the Defendants Above Named, to the Bill of Complaint of the Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainants' bill to be true in manner and form therein stated, set forth and alleged, files this its demurrer; and for cause of demurrer shows that said complainant has not as appears by said bill, made out any title to the relief therein prayed.

The defendant specially demurs to complainants' bill, and assigns as such grounds of demurrer:

I.

That it appears from the face of said bill that all of the proceedings required by statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had; and that the Commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made,
83 rendered and served; and that the conclusion of said Commission was not arbitrary, or reached through fraud; and, therefore, the act of the said Commission is final and conclusive, and not reviewable by the courts.

II.

That said bill does not set forth any act or circumstance showing fraud or arbitrary action on the part of the Commission, and if it be claimed that the act of the Commission was in any way irregular or arbitrary the same is not set forth in the said bill of complaint.

III.

That paragraphs IV, V, VI, VII, VIII, IX, X, XI, and XII, purporting, or tending, to show that complainant, Southern Pacific

Terminal Company, has a fee simple title to property in Galveston, Texas, on which its piers, tracks, docks, etc., are located, and which was leased to one E. H. Young, are immaterial, irrelevant, and constitute no showing either in whole or in part, upon which this Court should grant equitable relief.

IV.

That each and every portion of the bill of complaint which charges and avers that this defendant has not the power or jurisdiction to make such order of June 24, 1908, does not state any ground for equitable relief.

V.

That it appears from the face of the bill that each and every one of complainants is a common carrier subject to the act to regulate commerce.

VI.

That the only issue determinable in this suit is whether the order complained of was regularly made and duly served; that jurisdiction is conferred upon this court to hear and determine said issue by section 16 of the act to regulate commerce as amended June 29, 1906; and that the only proper and permissible party defendant is the Interstate Commerce Commission.

VII.

That there is a misjoinder of parties defendant.

84 VIII.

That the bill is indefinite, vague, uncertain and ambiguous in that it states merely the conclusion of the pleader, and does not allege any definite ultimate facts from which the court can determine that the order made by this defendant is not in accordance with the statute and the Constitution.

IX.

That it appears from the bill and from the report and order of the Commission attached thereto that the order complained of was regularly made, is a lawful order, and does not deprive complainant of any right under the statute or the Constitution of the United States.

X.

Wherefore, and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said bill, and prays to be instantly

dismissed, with its costs and charges in this behalf most wrongfully sustained.

INTERSTATE COMMERCE COMMISSION,
LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission.

GEO. H. TERRIBERRY,
Of Counsel.

UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, ss:

Luther M. Walter makes solemn oath and says: That he is the attorney for the above named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed for delay, but that the same is true in point of fact.

LUTHER M. WALTER.

Sworn to and subscribed before me a Notary Public in and for the Parish of Orleans, State of Louisiana, this ninth day of November, 1908.

CHAS. F. FLETCHINGER,
[SEAL.] *Notary Public.*

I hereby certify that the foregoing demurrer is well founded
85 in point of law.

LUTHER M. WALTER,
Solicitor for Defendant Interstate Commerce Commission.

(Indorsements:) No. 504. In the Circuit Court of U. S. S. D. of Texas. In Equity. So. Pac. Term. Co. et al. vs. Interstate Com. Com. et al. Demurrer to Bill by def't Int. Com. Com. Filed Nov. 16, 1908. C. Dart, Clerk, By G. Predecki, Deputy. Luther M. Walter Solicitor for Int. Com. Com. Geo. H. Terriberry, of Counsel.

86 *Order Denying Injunction Pendente Lite.*

Filed Nov. 16, 1908.

In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

The bill in this cause was presented to Honorable Andrew P. McCormick one of the judges of said court, on August 8th, 1908, and thereupon an order was made setting the application for an in-

junction *pendente lite* down for hearing before the three Circuit Judges of said circuit at New Orleans, on November 9, 1908, and the Honorable Attorney General having filed a certificate with the clerk of the court that in his opinion the case is of general public importance, the same came on to be heard on the day aforesaid, there being present Honorable Don A. Pardee, Honorable Andrew P. McCormick and Honorable David D. Shelby, Circuit Judges of said Fifth Circuit, and the said cause was heard on the motion and prayer of the complainants for a temporary injunction against the Interstate Commerce Commission and E. H. Young, defendants herein, and said cause was argued by solicitors for the complainants and solicitors for the defendants:—

Whereupon and on due consideration, a majority of the Judges being of opinion that said motion and prayer should not be granted, it is now ordered adjudged and decreed by the court that the motion for a temporary injunction be and the same is hereby denied and disallowed.

This November 13, 1908.

O. K.
D. A. P.

(Endorsements:) No. 504, Equity. Southern Pacific Terminal Company, et al. vs. Interstate Commerce Commission, et al. Order denying injunction *pendente lite*. Filed November 16, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

87 *Motion to Set Down Demurrers for Argument.*

In the Circuit Court of the United States, Southern Dist. of Tex.

504. Equity.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
vs.
INTERSTATE COMMERCE COMMISSION et al.

To the Honorable Circuit Court of the United States for the Southern District of Texas:

Herein comes the complainants, Southern Pacific Terminal Company, Galveston Harrisburg & San Antonio Railway Company and Southern Pacific Company by counsel in the above entitled and numbered cause, and moves the Court to set the demurrer filed by Defendants herein on November 16th 1908 down for argument.

SOUTHERN PACIFIC TERMINAL COMPANY,
GALVESTON, HARRISBURG & SAN ANTONIO RY. CO.
BAKER, BOTTS, PARKER AND GARWOOD,
Solicitors.
SOUTHERN PACIFIC COMPANY,
WM. HERRIN, *Solicitor.*

F. C. DILLARD, *Of Counsel.*

(Endorsements:) No. 504. Equity. Southern Pacific Terminal Co. et al. vs. Interstate Commerce Commission et al. Motion to set down demurrers for argument. Filed Nov. 27, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

88 *Order Setting Down Demurrers for Hearing and Argument.*

In the Circuit Court of the United States for the Southern District of Texas, Galveston District.

No. 504. In Equity.

SOUTHERN PACIFIC TERMINAL CO. et al.
vs.
INTERSTATE COMMERCE COMMISSION et al.

Now on this the 2nd day of December 1908, came on to be heard the motion of complainants, Southern Pacific Terminal Company, Galveston, Harrisburg & San Antonio Railway and Southern Pacific Company, to set down for argument the demurrers to the original bill of complaint filed herein on November 16, 1908, and the same having been considered by the Court, it is ordered that said demurrers be set down for hearing and argument at New Orleans, Louisiana, on December 16, 1908.

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Circuit Judges, Fifth Circuit.

(Endorsements:) No. 504, Eq. Southern Pacific Terminal Co. et al. vs. Interstate Commerce Commission, et al. Order setting down demurrers for hearing and argument. Filed Dec. 4, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

89 *Order Setting Down Motion of Complainants to Certify to the Supreme Court of the U. S. Refusal of Court to Grant Preliminary Injunction, etc., for Argument.*

In the Circuit Court of the United States for the Southern District of Texas, Galveston Division.

No. 504. In Equity.

SOUTHERN PACIFIC TERMINAL CO. et al.
vs.
INTERSTATE COMMERCE COMMISSION et al.

Now on this the 2nd day of December 1908 came on to be heard the motion of complainants, Southern Pacific Terminal Company,

Galveston Harrisburg and San Antonio Railway Company and Southern Pacific Company, to certify to the Supreme Court of the United States the refusal of this Court to grant preliminary injunction herein and the questions involved in the motion for preliminary injunction, and the same having been considered, it is ordered that the same be set down for argument at New Orleans, Louisiana, on December 16, 1908.

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Circuit Judges, Fifth Circuit.

(Endorsements:) No. 504 Eq. Southern Pacific Terminal Co. et al. vs. Interstate Commerce Commission, et al. Order setting down motion of complainants to certify to the Supreme Court of the U. S. refusal of Court to grant preliminary injunction etc for argument. Filed Dec. 4, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

90 *Demurrer to Cross-bill of E. H. Young.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Demurrer.

The Demurrer of the Interstate Commerce Commission, One of the Defendants Herein, to the Cross-Bill of Complaint of E. H. Young, One of the Defendants Herein.

The said defendant, the Interstate Commerce Commission, not confessing all or any of the matters in the cross-bill of the said defendant, E. H. Young, demurs to said cross-bill and for cause of demurrer shows:

That said defendant, E. H. Young, has not, as appears by his said cross bill, shown any title to the relief thereby prayed as against this defendant, the Interstate Commerce Commission.

Wherefore, and for divers other good causes of demurrer appearing in said cross bill, this defendant demurs thereto
91 and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to

the said cross bill, and prays to the instantly dismissed with its costs and charges in this behalf most wrongfully sustained.

INTERSTATE COMMERCE COMMISSION.
LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission.

GEO. H. TERRIBERRY,
Of Counsel.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Edward A. Moseley makes solemn oath and says: That he is the secretary of the above named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed for delay, but that the same is true in point of fact.

EDWARD A. MOSELEY.

Sworn and subscribed before me, a Notary Public in and for the District of Columbia, this seventh day of December, 1908.

[SEAL.] H. S. MILSTEAD,
Notary Public.

I hereby certify that the foregoing demurrer is well founded in point of fact.

LUTHER M. WALTER,
Solicitor for Defendant Interstate Commerce Commission.

(Endorsements:) No. 504. In Equity. Circuit Court of United States, Fifth Circuit Sou. Dist. of Texas. Southern Pacific Terminal Company et al. vs. Interstate Commerce Commission et al. Demurrer to cross bill of E. H. Young. Filed Dec. 10, 1908. C. Dart, Clerk, By G. Predecki, Deputy. Luther M. Walter, Solicitor for Interstate Commerce Commission. Geo. H. Terriberry, of Counsel.

92 *Order Overruling Demurrer of the Interstate Commerce Commission, One of the Defendants, to the Bill of Complaint, and Copy of Said Demurrer.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

This cause having been heard on an application for an injunction *pendente lite,* and a majority of the judges (McCormick and Shelby)

being of the opinion that the motion and prayer for an injunction should not be granted, said motion was overruled, as shown by the order of the Court of date, November 13, 1908.

The said cause coming on to be further heard before the same judges on the demurrer of the Interstate Commerce Commission, one of the defendants above named, to the original bill of complaint in this cause, and the cause being submitted to the Court on said demurrer, a majority of the judges (Pardee and Shelby) being of the opinion that the said demurrer to the said bill is not well taken, it is ordered, adjudged and decreed that the same be overruled. The said defendant, the Interstate Commerce Commission, is allowed fifteen days in which to answer the said bill.

A copy of the demurrer so overruled is attached to this decree. December 18, 1908.

93 In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Co., Complainants,

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Demurrer.

The demurrer of the Interstate Commerce Commission, one of the defendants above named, to the bill of complaint of the Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said complainants' bill to be true in manner and form therein stated, set forth and alleged, filed this its demurrer; and for cause of demurrer shows that said complainant has not, as appears by said bill, made out any title to the relief therein prayed.

The defendant specially demurs to complainants' bill and assigns as such grounds of demurrer:—

I.

That it appears from the face of said bill that all of the proceedings required by statute to be taken were duly taken and had; that after a formal complaint and answer a full hearing was had;
94 and that the Commission arrived at its conclusion after being fully advised; that the order complained of was duly given, made, rendered, and served; and that the conclusion of said Commission was not arbitrary, or reached through fraud; and, therefore, the act of said Commission is final and conclusive, and not reviewable by the courts.

II.

That said bill does not set forth any act or circumstance showing fraud or arbitrary action on the part of the Commission, and if it be claimed that the act of the Commission was in any way irregular or arbitrary the same is not set forth in the said bill of complaint.

III.

That paragraphs IV, V., VI., VII., VIII., IX., X., XI., and XII., purporting, or tending, to show that complainant, Southern Pacific Terminal Company, has a fee simple title to property in Galveston, Texas, on which its piers, tracks, docks, etc., are located, and which was leased to one E. H. Young, are immaterial, irrelevant, and constitute no showing either in whole or in part, upon which this Court should grant equitable relief.

IV.

That each and every portion of the bill of complaint which charges and avers that this defendant has not the power or jurisdiction to make said order of June 24, 1908, does not state any ground for equitable relief.

V.

That it appears from the face of the bill that each and every one of complainants is a common carrier subject to the act to regulate commerce.

VI.

That the only issue determinable in this suit is whether the order complained of was regularly made and duly served; that jurisdiction is conferred upon this court to hear and determine said issue by section 16 of the act to regulate commerce as amended June
95 29, 1906; and that the only proper and permissible party defendant is the Interstate Commerce Commission.

VII.

That there is a misjoinder of parties defendant.

VIII.

That the bill is indefinite, vague, uncertain and ambiguous in that it states merely the conclusion of the pleader, and does not allege any definate ultimate facts from which the court can determine that the order made by this defendant is not in accordance with the statute and the Constitution.

IX.

That it appears from the bill and from the report and order of the Commission attached thereto that the order complained of was regularly made, is a lawful order, and does not deprive complainant of any right under the statute or the Constitution of the United States.

X.

Wherefore, and for divers other good causes of demurrer appearing in said bill this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any other or further answer to said bill, and prays to be instantly dismissed, with its costs and charges in this behalf most wrongfully sustained.

INTERSTATE COMMERCE COMMISSION,

——— ———,
Solicitor for Interstate Commerce Commission.

——— ———,
Of Counsel.

96 UNITED STATES OF AMERICA,
State of Louisiana, Parish of Orleans, ss:

Luther M. Walter makes solemn oath and says. That he is the attorney for the above named defendant, the Interstate Commerce Commission, and that the above demurrer is not interposed for delay, but that the same is true in point of fact.

——— ———.

Sworn to and subscribed before me ——— ———, a Notary Public in and for the Parish of Orleans, State of Louisiana this ninth day of November, 1908.

——— ———,
Notary Public.

I hereby certify that the foregoing demurrer is well founded in point of law.

——— ———,
Solicitor for Defendant,
Interstate Commerce Commission.

(Indorsements:) No. 504, Eq. Southern Pacific Terminal Co., et al., vs. Interstate Commerce Commission, et al. Order overruling demurrer of *of* the Interstate Commerce Commission, one of the defendants, to the bill of complaint, and copy of said demurrer. Filed Dec. 23, 1908. C. Dart, Clerk, By G. Predecki, Deputy.

97 *Order Overruling Motion of Complainants to Certify Case to the Supreme Court of the U. S. and Opinion Thereon.*

In the Circuit Court of the United States, Fifth Circuit, Southern District of Texas. In Equity.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

VS.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Before Pardee, McCormick, & Shelby, Circuit Judges.

After the court had overruled the motion for an injunction pendente lite by a decree made by a majority of the judges, one of the judges dissenting, the complainants moved the court to certify the case to the Supreme Court. The Motion having been argued, the court overruled the same.

Pardee, Circuit Judge delivered the opinion of the Court.

98 Under the act of Congress entitled "An Act to protect trade andcommerce against unlawful restraint and monopolies," approved July 2d, 1890, injunctions *pendente lite* could be issued. Appeal not mentioned. Either party after final decree probably had the right to appeal under general laws.

Under the act to regulate commerce, approved Feby. 4, 1887, injunctions *pendente lite* do not appear to be provided for, but injunctions on final hearing could be issued. An appeal was allowed after final hearing to the Supreme Court by either party if $2,000 involved. By act of 1891 establishing Circuit Courts of Appeals, appeals generally were allowed, but through Circuit Court of Appeals.

In this state of things, the so-called expediting act, approved Feby. 11, 1903, was passed. This act in the first section provides that any suit in equity brought under above mentioned acts wherein the United States is complainant, on a certificate of the Attorney General as to public importance, the case is to be given precedence and in every way expedited and be assigned for hearing (final in our opinion; and see Joseph Dry Goods Co. v. Hecht, 120 F. R. 763) at the earliest practicable day before not less than three of the Circuit Judges and if there be not more than two circuit judges, then before them and such district judge as they may select, and in the event the judges sitting in such case (that is on hearing) shall be divided in opinion, the case is to be certified to the Supreme Court for review in like manner as if taken there by an appeal as thereinafter provided.

The second section of the act provides for an appeal by either party to the Supreme Court to be taken within sixty days only in cases under any of said acts wherein the United States is complainant.

This expediting act, fairly construed, permits the case to proceed (except it is to be given precedence and expedited) until final hearing, when it is to be set down before three circuit judges
99 After final decree it may be carried within sixty days by appeal to the Supreme Court by either party, and the only office left for the certificate is in the contingency that the judges shall be unable to agree on a final decree.

The sixteenth section of the Interstate Commerce Act, as amended July 29th, 1906, provides for the venue of the suits brought in any of the circuit courts against the Interstate Commerce Commission to enjoin, set aside or annul orders or requirements of the commission, and confers jurisdiction to hear and determine such suits in the courts of the proper venue. It then enacts that the provisions of an act to expedite the hearing and determination, &c, approved February 11, 1903, shall be hereby made applicable to all such suits, "including the hearing on an application for preliminary injunction," and the effect of this is to make the expediting act, so far as the concurrence of three circuit judges is concerned, applicable to the hearing of preliminary injunctions as well as to the final hearing.

We can find nothing further in the acts requiring three circuit judges to sit in any other phases of the case than the hearing on application for a preliminary injunction and on the final hearing. To apply it to all proceedings in the case is, in the nature of things, to defeat the very object of the act, and change it from an expediting act into a hindering and delaying act.

The sixteenth section, Interstate Commerce Act, as amended (and above mentioned) provides for an appeal to the Supreme Court from an interlocutory order granting or continuing an injunction, but no appeal from an order refusing a preliminary injunction is provided for in that act. Under the expediting act *per se* when the judges were divided in opinion, the case was to be certified to the Supreme Court in like manner as by the appeal thereinafter provided.

We have suggested that this provision could only be of
100 value in a case where the division of opinion among the judges on final hearing was such as to prevent a final decree. The question now is whether the same reasoning is to apply in cases where the judges differ in opinion as to whether an application for a preliminary injunction shall be granted or refused, but where the majority of the judges can and do render a decree. If such decree grants the injunction the Interstate Commerce Commission can appeal, and no certificate is necessary. If such decree refuses the injunction, the complainant can not appeal.

This is an apparent hardship to the complainant, but it is equally apparent that Congress so intended it. However, that may be, such hardship is not sufficient to warrant us in construing the provision in regard to a certificate in case of division of opinion otherwise than as meaning that a certificate is only proper and necessary

where through division of opinion no decisive decree can be
101 rendered.

The following decree will be entered:

This cause coming on to be heard on the motion of the complainants for an order certifying this case to the Supreme Court on the ground that the judges differed in opinion, two of the judges being of opinion that the motion for an injunction should be overruled, and one of the judges being of opinion that the motion for an injunction should be granted, the order refusing the injunction being entered by direction of a majority of the judges;

The said motion for an order certifying said cause to the Supreme Court having been argued by counsel, and the Court being of the opinion that the motion is not well taken, the said motion is overruled and disallowed for the reasons given in the opinion herewith filed.

December 18, 1908.

(Endorsements:) No. 504 Eq. Southern Pacific Terminal Co., et al., vs. Interstate Commerce Commission, et al. Order overruling motion of complainants to certify case to the Supreme Court of the U. S. and opinion thereon. Filed Dec. 23, 1908. C. Dart, Clerk, by G. Predecki, Deputy.

102 In the Circuit Court of the United States for the Southern District of Texas.

In Equity. No. 504.

SOUTHERN PACIFIC TERMINAL CO., SOUTHERN PACIFIC CO., GALVESTON, HARRISBURG & SAN ANTONIO RY. CO.

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

Answer of Interstate Commerce Commission, One of the Above-named Defendants, to the Bill of Complaint of the Above-named Complainants.

Lock McDaniel, United States Attorney; Luther M. Walter, Special Assistant United States Attorney, Solicitors for Defendant.

Filed January 2, 1909. C. Dart, Clerk, by G. Predecki, Deputy. Compared.

103 In the Circuit Court of the United States for the Southern District of Texas.

In Equity. No. 504.

SOUTHERN PACIFIC TERMINAL CO., SOUTHERN PACIFIC CO., GALVESTON, HARRISBURG & SAN ANTONIO RY. CO.

v.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

Answer of Interstate Commerce Commission, One of the Above-named Defendants, to the Bill of Complaint of the Above-named Complainants.

This defendant, Interstate Commerce Commission, now and at all times saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer, answering says:

I.

That this defendant is a bureau or department of the Government of the United States which was created and established and now exists under and by virtue of an act of the Congress of the
104 United States entitled "An act to regulate commerce," approved February 4, 1887, as amended by subsequent acts, and particularly as amended by act of June 29, 1906; and that the complainant Southern Pacific Terminal Co., a corporation of the State of Texas; the complainant Southern Pacific Co., a corporation of the State of Kentucky; and the Galveston, Harrisburg & San Antonio Ry. Co., a corporation of the State of Texas, are constituent members of what is known as the Southern Pacific Railroad and Steamship System and as such are common carriers engaged in interstate transportation of passengers and property wholly by railroad, and partly by railroad and partly by water, and as so engaged are subject to the provisions of said acts of Congress.

Defendant admits the allegations of Paragraph I that the matter and amount involved in this suit exceed the sum of $2,000 exclusive of interest and costs, and that the suit arises under the Constitution and laws of the United States; defendant admits that the suit herein is brought under powers granted and jurisdiction conferred by the said act to regulate commerce; but defendant denies that the suit herein is brought under the general equity powers of this court. On the contrary, defendant avers that this suit is brought, and can be brought in this court, only under the provisions of the act to regulate commerce, which provides in this court jurisdiction to hear and determine suits such as the one herein.

105 II.

Defendant admits the allegations of Paragraph II.

III.

Defendant admits the allegations of Paragraph III.

IV.

Defendant has no knowledge sufficient to form a basis for admission or denial as to the facts attempted to be stated in Paragraph IV of the bill of complaint and calls for strict proof of all the allegations in said paragraph contained. Defendant avers that said allegations, even if true, are not material to the issues in this suit. Said facts, if they be facts, were not presented to this defendant upon the hearing before it referred to in the bill of complaint and also referred to hereafter in this answer, and should not be considered by this court until the complainants herein have first presented said facts to this defendant in a petition for rehearing as provided for in section 16-A of the act to regulate commerce as amended by the act of June 29, 1906.

V.

Defendant has no knowledge sufficient to form a basis for admission or denial as to the facts attempted to be stated in Paragraph V of the bill of complaint and calls for strict proof of all the allegations in said paragraph contained. Defendant avers that said
106 allegations, even if true, are not material to the issues in this suit. Said facts, if they be facts, were not presented to this defendant upon the hearing before it referred to in the bill of complaint and also referred to hereafter in this answer, and should not be considered by this court until the complainants herein have first presented said facts to this defendant in a petition for rehearing as provided for in section 16-A of the act to regulate commerce as amended by the act of June 29, 1906.

VI.

Defendant has no knowledge sufficient to form a basis for admission or denial as to the facts attempted to be stated in paragraph VI of the bill of complaint, and calls for strict proof of all the allegations in said paragraph contained. Defendant avers that said allegations, even if true, are not material to the issues in this suit. Said facts, if they be facts, were not presented to this defendant upon the hearing before it referred to in the bill of complaint and also referred to hereafter in this answer, and should not be considered by this court until the complainants herein have first presented said facts to this defendant in a petition for rehearing as provided for in section 16-A of the act to regulate commerce as amended by the act of June 29, 1906.

VII.

Defendant has no knowledge sufficient to form a basis for admission or denial as to the facts attempted to be stated in Para-
107 graph VII of the bill of complaint and calls for strict proof of all the allegations in said paragraph contained. Defendant avers that said allegations, even if true, are not material to the

issues in this suit. Said facts, if they be facts, were not presented to this defendant upon the hearing before it referred to in the bill of complaint and also referred to hereafter in this answer, and should not be considered by this court until the complainants herein have first presented said facts to this defendant in a petition for rehearing as provided for in section 16-A of the act to regulate commerce as amended by the act of June 29, 1906.

VIII.

Defendant denies the allegations of Paragraph VIII.

IX.

Defendant denies the allegations of Paragraph IX.

X.

Defendant denies the allegations of Paragraph X.

XI.

Defendant denies the allegations of Paragraph XI.

XII.

Defendant denies the allegations of Paragraph XII.

108 XIII.

Defendant denies that the Southern Pacific Co. neither owns nor operates any railway in the State of Texas. Defendant denies that the railways in said State whose stock is owned by said Southern Pacific Co. are separate and distinct from each other either in management or operation, and denies that the connection of the Southern Pacific Co. with such railways is that of a stockholder only. Defendant avers that the truth is that such various railways are controlled and operated by the Southern Pacific Co. as completely as if the Southern Pacific Co. was an individual and as completely as if no corporate fictions existed as to any of said railroads. Defendant denies that the Southern Pacific Terminal Co. is a separate and independent corporation either in management or in operation. Defendant avers that the individuals owning the stock of said corporations and the officers and directors of said corporations intentionally and with the purpose of avoiding the provisions of the statutes of the United States for the regulation of interstate commerce and parties engaging therein organized the various corporations herein referred to and placed in charge of such corporations the same individual officers, so that there is to all intents and purposes common control, management, and operation of all the properties known as the Southern Pacific Railroad and Steamship System.

109 Defendant further avers that the relation, management, ownership, and operation of said corporations constitute a device intended to operate to defeat the provisions of said act to regulate commerce, as will appear from the facts hereinafter set forth.

XIV.

Defendant denies all the allegations of paragraph XIV, and especially denies the allegation of said paragraph that the Southern Pacific Terminal Co. is not a common carrier, issues no bills of lading, owns no rolling stock, and in no way engages in the transportation of freight or passengers. Defendant avers, on the contrary, that the Southern Pacific Terminal Co. owns tracks of railroad which are used by the complainant Galveston, Harrisburg & San Antonio Ry. Co. in the movement of interstate traffic. Said complainant Galveston, Harrisburg & San Antonio Ry. Co. has no tracks other than these whereby it can reach vessels berthed at the docks of the Southern Pacific Terminal Co.

XV.

Defendant denies the allegations of paragraph XV.

XVI.

Defendant denies the allegations of Paragraph XVI, and particularly the allegation that the great bulk of meal and cake purchased by Young and handled by him is purchased in the State of Texas and as such is intrastate commerce. On the contrary,
110 defendant avers that the meal and cake purchased by Young and shipped into Galveston and handled by the complainants for said Young is traffic shipped from a place in the United States to a foreign country and carried from such place to a port of transshipment. Defendant further avers that said traffic is entirely intended for export to a foreign country, is known to be for export, by the complainants who carry such traffic, and by all parties who are in anywise connected with the handling of such products. Defendant further avers that there is no consumption of said products at Galveston in the State of Texas. Defendant further avers that a large portion of such traffic originates at points in Oklahoma, Arkansas, and Louisiana.

XVII.

Defendant denies all the allegations of Paragraph XVII, and particularly the allegation that the Southern Pacific Terminal Co. is a corporation distinct from and independent of the Southern Pacific Co. or the Galveston, Harrisburg & San Antonio Ry. Co. Defendant avers that the said three corporations are part and parcel of the Southern Pacific Railroad and Steamship System and as such are operated for the benefit of, and are managed by, the one owner, to wit, the Southern Pacific Co.

XVIII.

Defendant denies the allegations of Paragraph XVIII.

111 XIX.

Defendant admits the allegations of Paragraph XIX that on or about the 11th day of September, 1907, Carl Eichenberg filed his petition before this defendant against the Southern Pacific Co. and

the Southern Pacific Terminal Co. complaining of said companies in that they by an arrangement with said Young were violating section 3 of the interstate commerce act and giving said Young an undue and unreasonable preference and advantage over his competitors. Defendant admits that no other parties were defendants to the petition before this defendant, but avers that upon its own motion it made the Galveston, Harrisburg & San Antonio Railway Co. and other railroad companies parties defendant. Defendant admits that at the time of the making of the order in said case it dismissed the complaint as to all defendants except the complainants herein.

Defendant denies that said Young was never in any way made a party to said proceedings. On the contrary, defendant avers that at the taking of evidence by this defendant said Young was represented by counsel who cross-examined witnesses; that said Young was at all times present during the taking of said evidence and was present at the argument when the case was finally submitted to this defendant, and himself made statements and answered questions propounded to him by members of this defendant.

112 Defendant admits that no facts were presented to it as to the Menard grant and the title therein held by the Southern Pacific Terminal Co., as shown by deeds, judgment, and conveyances. Defendant admits that no question was raised on said hearing as to the title of said Terminal Co. and that no issue was made as to the same. In this connection, defendant avers that said Southern Pacific Terminal Co. has not a title in fee simple, but that by reason of the various acts of the legislature of the State of Texas and ordinances of the city of Galveston and the acceptance of the provisions of said acts and ordinances by the Southern Pacific Terminal Co. and its predecessors in ownership of the property now owned and controlled by said Southern Pacific Terminal Co., the said Terminal Co. holds its property charged with the public use expressed in the grant to its predecessor Huntington; that said Huntington had only a conditional title and could convey to the said Terminal Co. no greater right than he possessed. Defendant further avers that the land and franchise having been granted for a specific public purpose, as hereinafter set forth, said property became charged with a public use, and as such dedicated to the use of the public. Defendant avers that even if said Southern Pacific Terminal Co. has title in fee simple to said lands and franchises it can not contract or lease the same so as to unduly or unreasonably prefer or discriminate as between

113 shippers of interstate traffic. Defendant further avers that no lease was actually made to said Young; that the contract whereby Young received certain rights and privileges, as hereinafter set forth, was not in any sense of the word a lease, but that the same is no more and no less than a contract for certain privileges and the use of certain facilities; that said contract was entered into for the express purpose of attempting to evade the statute; that under such contract said Young has secured to himself practically a monopoly of the business of exporting cotton seed meal and cake from the port of Galveston; that such contract was designed to unduly and unreasonably prejudice all competitors of said Young;

and that the result of said contract has been to completely accomplish the purpose of granting undue and unreasonable preferences and advantages to said Young and subjecting his competitors to undue and unreasonable discrimination and disadvantage.

Defendant admits that on June 24, 1908, it entered its order whereby it directed the Southern Pacific Co., the Southern Pacific Terminal Co., and the Galveston, Harrisburg & San Antonio Ry. Co., on or before the 1st day of September, 1908, and for a period of not less than two years thereafter, to abstain from granting and giving to E. H. Young, or any other person, any undue or unreasonable preference or advantage which now accrues to said Young through failure of said defendants (before the Commission)
114 to exact from said Young payment of wharfage charges while at the same time exacting such wharfage charges from other shippers, and further ordered said defendants (before the Commission) during said time to abstain from giving to said Young or any other person for his exclusive use space on the wharves at Galveston for use in storage and handling of cotton-seed meal and cake while contemporaneously refusing and denying similar privileges for the use of said wharves to other shippers under substantially similar circumstances and conditions.

Defendant admits that the order is correctly set forth in the bill of complaint. Defendant further avers that by its order duly entered and served upon the complainants herein, time for compliance with said order of this defendant was extended until November 16, 1908. The defendant attaches hereto as Exhibit A the report and opinion of the Commission and prays that the same be taken as part hereof as fully as if it were set forth at length in this paragraph. Defendant avers that in said report and opinion this defendant correctly stated the material facts.

Defendant avers that the evidence taken before it in the hearing of the Eichenberg complaint conclusively showed, and the fact is, that the arrangement, lease, or contract complained of constituted an undue and unreasonable preference and advantage to said Young and an undue and unreasonable discrimination and disad-
115 vantage to other shippers of the same commodity as that shipped by Mr. Young. Among the facts shown are the following:

The Southern Pacific Terminal Co. is a Texas corporation organized in 1901 and its articles of incorporation include the following:

The purposes for which this corporation is formed are to construct, buy, lease, own, maintain, operate, and convey warehouses, docks, and wharves, and grain elevators, including the construction, owning, and operating docks on the coast of this State for the protection and accommodation of ships, boats, and all kinds of vessels for navigation and their cargoes, and to avail of, use, and enjoy the properties, rights, privileges, and franchises granted and described and referred to in the act of the legislature of the State of Texas entitled "An act ratifying and confirming an ordinance passed by the city council of the city of Galveston on the 4th

day of February, 1899, entitled 'An ordinance abandoning, discontinuing, and closing certain streets, avenues, and alleys of the city of Galveston and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the city of Galveston upon certain specified conditions,' and conditionally relinquishing any claim the State of Texas may have to part of the property therein described," approved May 1, 1899, and in the ordinance set forth in the preamble of said act,
116 including the right to construct and maintain piers upon the property described by metes and bounds in said ordinance, and upon the property lying and situated between the same and the Galveston Harbor line of 1897, and to dredge between and on the sides of such piers and northerly and northeasterly therefrom and from said harbor line of 1897 so as to permit the securing of at least 25 feet of water at mean low water between and beside such piers and northerly and northeasterly therefrom and so as to secure a connection by a continuous channel 25 feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least 500 feet in length and 50 feet beam and drawing at least 25 feet of water to conveniently go at mean low water from the waters of the Gulf of Mexico to and lie alongside of said piers and to maintain the same, and to construct and maintain upon said property terminal facilities for the use of what are commonly called the "Southern Pacific Railroad and Steamship systems," their successors or assigns, also to buy, lease, receive, own, hold, and enjoy real and personal property necessary in the transaction of its business.

Pursuant to the provisions of the act approved May 1, 1899, above referred to, section 2 of said act is hereby incorporated herein:

SEC. 2. The said Collis P. Huntington, his heirs or assigns, or the person, company, or corporation owning or controlling the above-described property and all the improvements thereon situ-
117 ated, shall never consolidate said property or the stock or franchise of such corporation as may own or control the same with the stock or property of the Galveston Wharf Company, or any company or corporation succeeding to the rights of the said Galveston Wharf Company; nor shall the owner of said property enter into any agreement with the Galveston Wharf Company, its successors or assigns, or any other wharf company which may now exist or which may be hereafter organized, by which the wharf or other terminal charges shall be regulated or fixed; and this inhibition upon the said Collis P. Huntington, his heirs or assigns, or the person, company, or corporation owning or controlling the above-described property and all the improvements thereon situated, shall also apply to the property now owned by the Gulf, Colorado & Santa Fe Railway Company between Fourth and Tenth streets, as shown by the Galveston City Company's map of the said city of Galveston. Nor shall any person owning or holding any interest in the form of stock or otherwise in the property hereinbefore described own or hold any interest in the form of stock or otherwise in the wharf or bay

frontage between Fourth and Forty-first streets, as now shown by the Galveston City Company's map of the said city of Galveston, and all sales, conveyances, and transfers of whatsoever character in violation of this section shall be null and void, the object of
118 this section being to keep the control, ownership, or management, direct or indirect, of the property hereinbefore described and the control, ownership, or management of the wharf or bay frontage between the said Fourth and Forty-first streets entirely distinct and independent of each other. And no charter formed for the use, operation, and management of the property hereinbefore described shall be granted unto the said Collis P. Huntington or his assigns unless this section be incorporated therein, and all certificates of stock that may be issued by the company formed for the use, operation, or management of the property hereinbefore described shall also contain this section on the back thereof.

III.

The business of this corporation shall be transacted in Galveston County, Tex., and its principal office and domicile shall be located in the city of Galveston, in said county.

* * * * * * *

VI.

The amount of the capital stock of this corporation shall be $1,000,000, divided into 10,000 shares of the par value of $100 each.

The properties, rights, privileges, and franchises granted to said Collis P. Huntington are described and defined in legislative act approved May 1, 1899. (See General Laws, 26th Legislature.) The lands described were granted for the purpose of constructing,
119 maintaining and operating thereon "depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship system." Shortly after said date of May 1, 1899, said Huntington began the work of constructing docks and wharves upon the granted land, and this work was in progress when the flood in the year 1900 rendered it practically useless. The property, with said improvements thus begun by said Huntington, was acquired by the said Southern Pacific Terminal Co. Upon the property of the said Terminal Co. have been laid railroad tracks connecting with the various railroad lines entering the city of Galveston. The motive power necessary to move cars over said lines of railroad tracks is furnished by the complainant Galveston, Harrisburg & San Antonio Ry. Co., which pays to said Terminal Co. a trackage charge and receives a switching charge for each car from said Southern Pacific Terminal Co. The lines of the Galveston, Harrisburg & San Antonio Ry. Co. extend from Galveston to various points within the State of Texas, and over such lines are carried by complainants herein interstate and foreign traffic. All through shipments over what is known as the Southern Pacific Railroad and Steamship system between different States of the Union pass over the line of railway owned by the Southern Pacific Terminal Co. The railroad and steamship lines forming the so-called Southern Pacific system are

all owned by the Southern Pacific Co.; the latter company
120 and the companies owned by it, especially the other two complainants herein, have the same president and managing officers, and their relation is such as to assure that the interests of the whole will be subserved by the acts of each constituent part. The complainant Southern Pacific Co. owns and controls lines of railroad reaching from New Orleans, in the State of Louisiana, to San Francisco, in the State of California, and Galveston, in the State of Texas, and a steamship line from said Galveston to New York, in the State of New York, and Habana, in the Republic of Cuba. The complainant Southern Pacific Terminal Co. forms a link in the chain of interstate transportation and is necessary to complete the highway over which move shipments in interstate and foreign commerce. All parts of this highway of interstate and foreign commerce are owned by the single corporation the complainant Southern Pacific Co.

Defendant avers that it makes no difference whether or not the Galveston, Harrisburg & San Antonio Ry. Co. owns the Southern Pacific Terminal Co., because the ownership of both of said corporations is vested in the complainant Southern Pacific Co. Defendant further avers that control is an incident of ownership, and that the interests of the railroad and steamship lines of the Southern Pacific system transporting shipments to and from Galveston, in the State of Texas, are identical. All money earned and dividends paid inure to the one owner, the Southern Pacific Co. Defendant avers
121 that said complainant Southern Pacific Terminal Co. held itself out as a common carrier, as having connections with other lines of railroad and that upon notice it would meet the rates of competing lines.

Defendant avers that the three complainants herein constitute a system engaged as a whole in the transportation of commerce, and that to the extent such commerce is interstate or foreign this defendant has jurisdiction to supervise and control it within statutory limits. Defendant avers that to hold otherwise would be to open the door to devices whereby the statute may be evaded. Defendant further avers that it is not concluded by the form, but looks to the substance of the relations between corporations engaged in interstate commerce. To all intents and purposes, and in fact within the meaning of the act to regulate commerce, the Southern Pacific Terminal Co. is part of the Galveston, Harrisburg & San Antonio Ry. Co. It is a necessary element and facility of the interstate transportation in which the Southern Pacific system is engaged. The Southern Pacific Railroad and Steamship system have no other terminal facilities in the city of Galveston than those afforded by the Southern Pacific Terminal Co.

Defendant avers that the making of said contract (set forth in full in Exhibit A hereto attached) and the operation of complainants thereunder, gives an undue and unreasonable preference and advantage to E. H. Young and subjects all other shippers,
122 and especially competitors of E. H. Young, to undue and unreasonable discrimination and disadvantage in that (*a*) the

exporter having such contract has space and room in which to store, free of storage charges, large quantities of cotton-seed products, which space and room exporters not having such contract do not enjoy; (*b*) the exporter having such contract can, thereby, accumulate on the wharf quantities of cotton-seed products sufficient to make his export shipments in cargo lots, which it is impossible for exporters without such contract to do; (*c*) the exporter having such contract can erect and operate on the wharf machinery for the purpose of grinding, compressing, and sacking cotton-seed products, which cannot be done by exporters not having such contract; (*d*) the exporter having such contract is enabled to load his steamers and thus make the profit of the stevedore and can thereby unload his cars and thus make the profit of a contractor, all of which it is impossible for exporters without such contract to do; (*e*) the exporter having such contract is enabled to charter his own vessels, thus making the profit of a charterer, together with such bonus for dispatch as may be earned, which it is impossible for exporters without such contract to do; (*f*) the exporter with such contract is enabled to make a saving on the cost of switching cars to him consigned which it is impossible for exporters without such contract to do; (*g*) the exporter having such contract is exempt from demurrage
123 charges which accrue after the product remains ten days in the cars or on the wharves and which must be paid by exporters not having such contract; (*h*) the exporter having such contract has no wharfage charges of any kind to pay after he has shipped 75,000 tons of cake and meal at the rate of 1 cent per 100 pounds, which charges all other exporters are compelled to pay; and (*i*) the exporter having such contract has advantages, exclusive of, and in addition to, the usual profit on the cotton-seed products exporting business, amounting to from 30 to 40 cents per ton, none of which profits can be made by exporters who do not possess such contract.

XX.

Defendant denies the allegations of Paragraph XX.

XXI.

Defendant denies the allegations of Paragraph XXI.

XXII.

Defendant denies the allegations of Paragraph XXII.

XXIII.

Defendant denies the allegations of Paragraph XXIII.

XXIV.

Defendant denies the allegations of Paragraph XXIV.

XXV.

Defendant denies the allegations of Paragraph XXV.

124

XXVI.

Defendant denies the allegations of Paragraph XXVI.

Defendant avers that the complainants should not be heard to maintain this suit in equity for that the said complainants have a complete and adequate remedy by proceedings before this defendant in that all the matters and things in the complainants' bill set forth are cognizable before this defendant; that upon application of the complainants, or of any of them, and upon proper showing, this defendant has power to suspend, *modify*, or amend in whole or in part the order complained of and to consider any and all of the matters in the complainants' bill set forth and to take such action thereon and to make such order thereon as in its judgment would be proper to make; and that in advance of such application by the complainants to this defendant the complainants are not entitled as a matter of right to invoke the jurisdiction of this court in equity.

Defendant further avers that this court, sitting as a court of equity, should not herein either hear or determine the rights of the complainants upon any state of facts which were within the knowledge of the complainants and which they failed and neglected to present before this defendant at the time of the hearings out of which the order complained of grew, nor on account of any facts, matters, or things which may have arisen since said hearings,

125 except such facts, matters, or things be first presented by application for rehearing or otherwise to this defendant. Neither does said bill of complaint set forth any reason why any such matters and things could not be or were not presented to this defendant, nor that any facts, matters, or things have arisen since the said hearing, nor that the complainants, or either of them, have in any manner been prevented from presenting to this defendant for its consideration any of the matters or things in the complainants' bill set forth.

Complainants have failed to make any application to the defendant for a rehearing of said matter, on account of any such facts, to have said order suspended, set aside, or modified, although complainants well knew at all times since June 24, 1908, the date of the report of the defendant, that the order complained of would be issued as a matter of course unless upon application of the complainants herein (defendants before the Commission) such facts should be shown to this defendant as would entitle complainants to have said order suspended, modified, or set aside.

Defendant avers that this court ought not to consider the averments in complainants' bill of complaint that the order of this Commission is unnecessary, unreasonable, and unjust, because all such allegations and declarations are statements of opinion and conclusions of interested parties and do not have coupled therewith any statement of any of the essential elements of facts upon which or

126 from which this court could determine whether the order complained of is necessary, reasonable, and just.

XXVII.

Defendant denies the allegations of Paragraph XXVII.

XXVIII.

Defendant therefore denies each and all of the allegations of complainants' bill of complaint not otherwise specifically denied herein and which defendant is advised is material or necessary to be answered, and says that the conclusions, inferences, and arguments are erroneous and without foundation, and that the order which this defendant made is in all things just, reasonable, and lawful, and deprives the complainants of no rights under the statutes or the Constitution of the United States.

Defendant denies that the complainants are in anywise entitled to the relief, or any part thereof, prayed for in the bill of complaint, or any relief whatsoever, and prays to be dismissed with its reasonable charges in this behalf most wrongfully sustained.

INTERSTATE COMMERCE COMMISSION,
[SEAL.] By EDWARD A. MOSELEY,
Secretary Thereof, Thereunto Duly Authorized.
LOCK McDANIEL,
United States Attorney;
LUTHER M. WALTER,
Special Assistant United States Attorney,
Solicitors for Defendant.

127 WASHINGTON,
District of Columbia:

Edward A. Moseley, being first duly sworn, says on oath that he is secretary of the defendant; that he knows the contents of the foregoing answer; and that the matters and things stated therein are true to the best of his knowledge and belief.

EDWARD A. MOSELEY.

Subscribed and sworn to before me this 29th day of December, 1908.

[SEAL.] H. S. MILSTEAD,
Notary Public.

128 EXHIBIT A.

129 No. 1277.

CARL EICHENBERG
v.
SOUTHERN PACIFIC COMPANY et al.

Submitted April 3, 1908; Decided June 24, 1908.

1. Complaint alleges that a lease by the Southern Pacific Terminal Company to one Young, an exporter of cotton-seed products, of a portion of its wharf at Galveston, Tex., gives him undue preference and advantage and results in unreasonable prejudice

to competing exporters. The Southern Pacific Company urges that it is a holding company and the Terminal Company that it is a wharfage company, and both assert that they are not common carriers within the meaning of the act and challenge the jurisdiction of the Commission; *Held*, That, as the railroad and steamship lines forming the so-called Southern Pacific system are one in control and operation, are owned by the Southern Pacific Company, and are identical in officers and interests; and that, as the Terminal Company was organized to furnish terminal facilities for the Southern Pacific system at Galveston, and through shipments on the system lines pass and repass over the docks of the Terminal Company, the latter forms a necessary link in the chain of interstate commerce and is subject to the act.

2. The contention that inasmuch as the Terminal Company is not owned by the railroad company with which the tracks on its dock connect it cannot be held to be a part of that or any other railroad is rejected. It makes no difference whether or not the connecting railroad company owns the Terminal Company if the ownership of both is vested in the same corporation, and it appears that the interests and officers of the railroad and steamship lines of the system transporting shipments to and from Galveston are identical.

3. Neither can the Commission yield assent to the proposition that the point where the railroad lines end and the tracks of the Terminal Company begin is the point beyond which the power of the Commission does not extend. The Terminal Company is part and parcel of the system engaged as a whole in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise
130 and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all their terminals and terminal facilities from the regulating authority of the Commission.

4. The Commission is not concluded by the form, but looks to the substance of the relations between corporations engaged in interstate commerce. The Terminal Company, for the purposes here in question, is part of the Galveston, Harrisburg & San Antonio Railway Company. It is a necessary element in and facility of the interstate transportation in which the Southern Pacific system is engaged, and as such is subject to the jurisdiction of the Commission.

5. The lease made with Young should be considered with respect to its effect on Young's interests as a shipper and the Terminal Company's interests in transportation. It was not made for the purpose of giving Young possession and control of a dock for his own use, but by its terms was designed to secure to the Terminal Company and allied interests control of the transportation of the product of a great industry. Young desired to do a large export cotton-seed product business at the port, and the

system desired to secure the transportation of such product. To accomplish these ends the contract was made, and it is in the light of this condition that it must be considered. The system has the undoubted right in competition for traffic to secure to itself all it can legitimately, but in doing so it may not unduly prefer or prejudice any shipper.

6. If the Terminal Company may make a contract with a shipper of cotton-seed products and give him thereby certain privileges which it does not give to other shippers of the same commodities, it may also make similar contracts with regard to cotton or other products and thus secure to favored shippers the control of export business of the port of Galveston. The giving of undue preference to any shipper is condemned by the statute, and it can make no difference that such preference is given by a contract which purports to be a lease of property. To hold otherwise would in effect sanction a device to evade the law.
7. Under the circumstances shown by the record the Commission is of opinion that the Southern Pacific Company, the Southern Pacific Terminal Company, and the Galveston, Harrisburg & San Antonio Railway Company give to said Young undue preferences in exempting him from the payment of wharfage charges which are exacted from all other shippers and in furnishing for his exclusive use space on the docks of the Terminal Company to store and handle cotton-seed products, which they at the same time refuse to furnish other shippers under like circumstances; and the Commission finds that the giving of such preferences and advantages is unlawful.

Marsene Johnson, George C. Clough, George H. Terriberry, and John C. Walker for complainant.

Baker, Botts, Parker & Garwood, and F. C. Dillard for defendants.

Report of the Commission.

KNAPP, Chairman:

It is alleged in this complaint, among other things, that a lease by the Southern Pacific Terminal Company to one E. H. Young,
131 an exporter of cotton seed cake and meal, of a portion of its wharf at Galveston, Tex., gives him undue and unreasonable preference and advantage over complainant and other exporters of such products from Galveston and elsewhere, and subjects complainant and other exporters to undue and unreasonable prejudice and disadvantage in violation of section 3 of the act to regulate commerce. Complainant prays damages in the sum of $40,000, which it is alleged he has suffered in the premises.

The Southern Pacific Company and the Southern Pacific Terminal Company challenge the jurisdiction of the Commission. They assert that they are not common carriers within the meaning of the regulating statute. The former company avers in its answer that it is not a party to the lease mentioned in the complaint. The latter company avers that the lease is a matter of private contract; that

it has a right to make such a lease, and that the same does not unlawfully prejudice any exporter of cotton-seed products from Galveston or elsewhere. The other defendants answer that they are strangers to the contract of lease to Young, and that if it results in undue prejudice to other exporters it is a matter over which they have no control.

Facts necessary to be considered are as follows:

Prior to January 1, 1907, complainant was an exporter of cotton-seed products from the port of Galveston, doing business under the name of the Gulf Ports Trading Company. That company was a corporation organized under the laws of Texas in 1900. Some time in 1903, it appears, complainant acquired all the stock of the corporation, the charter of which was forfeited July 1, 1905, for nonpayment of franchise taxes. Since January 1, 1907, complainant has been engaged in a small way as broker of cotton and cotton-seed products.

Galveston is situated on an island in the Gulf of Mexico lying west of the mouth of Galveston Bay. In 1896-97 the water channels leading to the city were deepened by the Federal Government to 30 feet, and since then exports have largely increased. The city is reached by the Gulf, Colorado & Santa Fe; Galveston, Harrisburg & San Antonio; Galveston, Houston & Henderson; Gulf & Interstate; International & Great Northern, and Missouri, Kansas & Texas railroads. A single-track bridge near the northerly end of the island spans the bay, by means of which bridge all railroads enter the city. No railroad has tracks upon or access over its own rails to docks and wharves on the bay. Galveston lies on the northerly portion of the island, and the bay front of the city is devoted to wharfage purposes. The streets which extend back from the bay are numbered, commencing with 1, at the southeastern end.

132 Practically all traffic entering Galveston by rail is destined for export, and facilities for the transfer of freight from railroad cars to ships and vice versa are furnished by the Galveston Wharf Company and the Southern Pacific Terminal Company. The former has been in the wharfage business since 1854, and owns docks and piers extending from Tenth to Forty-first streets. It operates a railroad in the city for switching purposes. The Terminal Company owns real estate on the water front, acquired in 1901, and has constructed on a portion thereof docks and piers, and has dredged slips to accommodate ocean-going vessels. It owns no locomotives or rolling stock of any kind, issues no bills of lading, and switching service for it is performed by the Galveston, Harrisburg and San Antonio railroad, the rails of which connect with tracks laid upon the docks and owned by the wharf company. These tracks lead out from the docks for a distance of about 5,000 feet. Both the companies named hold themselves out as public wharfingers and make a charge of 1 cent per 100 pounds for cotton-seed meal and cake which pass over their wharves. Vessel owners are held responsible for wharfage charges where the shipments are upon local bills of lading. Shipments on through bills of lading include in the freight rate the

wharfage charges. The wharfage appears as a terminal charge and is published in the tariffs of the railroad companies entering the city.

The Southern Pacific Terminal Company is a Texas corporation, organized in 1901, and its articles of incorporation include the following:

* * * * * * *

II.

The purposes for which this corporation is formed are to construct, buy, lease, own, maintain, operate, and convey warehouses, docks, and wharves, and grain elevators, including the construction, owning, and operating docks on the coast of this state for the protection and accommodation of ships, boats, and all kinds of vessels for navigation and their cargoes, and to avail of, use and enjoy the properties, rights, privileges, and franchises granted and described and referred to in the act of the legislature of the state of Texas entitled "An act ratifying and confirming an ordinance passed by the city council of the city of Galveston on the 4th day of February, 1899, entitled 'An ordinance abandoning, discontinuing, and closing certain streets, avenues, and alleys of the city of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the city of Galveston upon certain specified conditions,' and conditionally relinquishing any claim the state of Texas may have to part of the property therein described," approved May 1, 1899, and in the ordinance set forth in the preamble of said act, including the right to construct and maintain piers upon the property described by metes and bounds in said ordinance, and upon the property lying and situated between the same and the Galveston harbor line of 1897, and
133 to dredge between and on the sides of such piers and northerly and northeasterly therefrom and from said harbor line of 1897 so as to permit the securing of at least 25 feet of water at mean low water between and beside such piers and northerly and northeasterly therefrom and so as to secure a connection by a continuous channel 25 feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least 500 feet in length and 50 feet beam and drawing at least 25 feet of water to conveniently go at mean low water from the waters of the Gulf of Mexico to and lie alongside of said piers and to maintain the same, and to construct and maintain upon said property terminal facilities for the use of what are commonly called the "Southern Pacific Railroad and Steamship systems," their successors or assigns, also to buy, lease, receive, own, hold, and enjoy real and personal property necessary in the transaction of its business.

Pursuant to the provisions of the act approved May 1, 1899, above referred to, section 2 of said act is hereby incorporated herein:

"Sec. 2. The said Collis P. Huntington, his heirs or assigns, or the person, company, or corporation owning or controlling the above-described property and all the improvements thereon situated, shall never consolidate said property or the stock or franchise of such cor-

poration as may own or control the same with the stock or property of the Galveston Wharf Company, or any company or corporation succeeding to the rights of the said Galveston Wharf Company, nor shall the owner of said property enter into any agreement with the Galveston Wharf Company, its successors, or assigns, or any other wharf company which may now exist, or which may be hereafter organized, by which the wharf or other terminal charges shall be regulated or fixed, and this inhibition upon the said Collis P. Huntington, his heirs, or assigns, or the person, company, or corporation owning or controlling the above-described property, and all the improvements thereon situated shall also apply to the property now owned by the Gulf, Colorado & Santa Fe Railway Company between Fourth and Tenth streets, as shown by the Galveston City Company's map of the said city of Galveston. Nor shall any person owning or holding any interest in the form of stock or otherwise in the property hereinbefore described, own or hold any interest in the form of stock or otherwise in the wharf or bay frontage, between Fourth and Forty-first streets, as now shown by the Galveston City Company's map of the said city of Galveston, and all sales, conveyances, and transfers of whatsoever character, in violation of this section, shall be null and void; the object of this section being to keep the control, ownership, or management, direct or indirect, of the property hereinbefore described, and the control, ownership, or management of the wharf or bay frontage between the said Fourth and Forty-first streets entirely distinct and independent of each other. And no charter formed for the use, operation, and management of the property hereinbefore described shall be granted unto the said Collis P. Huntington, or his assigns, unless this section be incorporated therein, and all certificates of stock that may be issued by the company formed for the use, operation, or management of the property hereinbefore described shall also contain this section on the back thereof."

III.

The business of this corporation shall be transacted in Galveston County, Tex., and its principal office and domicile shall be located in the city of Galveston, in said county.

* * * * * * *

134 VI.

The amount of the capital stock of this corporation shall be $1,000,000, divided into 10,000 shares of the par value of $100 each.

The properties, rights, privileges, and franchises granted to Collis P. Huntington are described and defined in the legislative act approved May 1, 1899 (General Laws, twenty-sixth legislature). The lands described were granted for the purpose of constructing, maintaining, and operating thereon "depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship systems." In its preamble the act states:

It is greatly to the interest of the public that the property described * * * should be developed for shipping and transportation purposes, and that the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and state, and to utilize, as far as practicable, the deep water at said port secured by the expenditure of large sums of money by the Government of the United States.

Soon after the passage of this act Huntington began the work of constructing docks and wharves upon the granted lands. This work was in progress when the great flood of 1900 rendered it practically useless. The property acquired by the Terminal Company is that described in the legislative act, and that upon which the improvements above referred to were made.

During the year 1901 the Terminal Company erected covered piers known as A and B on a portion of its docks, which were operated generally for wharfage purposes. June 26, 1905, the company agreed to construct a covered pier to be known as C on an unoccupied dock and contracted to give possession of the same to one E. H. Young for a period of five years at an annual rental of $5,000, granting him also certain privileges with respect to handling and storing cotton-seed meal and cake. January 9, 1906, a supplemental agreement was made between Young and the company, whereby, in consideration of additional space, the annual charge was increased $470 per year. November 1, 1906, the above agreements were merged in a contract as follows:

This memorandum of agreement made and entered into on this the 11th day of September, 1906, by and between the Southern Pacific Terminal Company, a body corporate under the laws of Texas, hereinafter designated as Terminal Company, or party of the first part, and E. H. Young, of Galveston, Galveston County, Tex., party of the second part, witnesseth:

1.

That the said Terminal Company has leased, demised, and let, and hereby leases, demises, and lets unto the said E. H. Young for a term of five years, beginning on the first day of November, A. D. 1906, and thereafter from year to year until the term of this lease
135 shall be terminated as hereinafter provided, a certain dock and warehouse with shed, platform, and tracks thereon, as outlined in blueprint map attached hereto, as a part hereof, and marked "Exhibit A." This lease is made upon the condition that the said Young shall have the right to use such available facilities as may exist on the west side of pier B until the facilities hereby leased shall have been completed in accordance with the blueprint map hereto attached as aforesaid, but not longer.

2.

The said Young shall have the privilege of placing in said warehouse such machinery, appliances, and apparatus for storing and handling cotton seed and cotton-seed products as may be required by him, and shall use electric power for operating said appliances

and apparatus, and said Terminal Company agrees to furnish him such electric power at a reasonable rate, to be fixed and readjusted from time to time during the term of this contract by agreement between the parties, for the purpose of operating all such machinery, appliances, and apparatus as may be required by said Young in the handling and storing of cotton seed and cotton-seed products in said dock and warehouse hereinbefore mentioned.

3.

Said Terminal Company further agrees to keep said dock and warehouse in reasonable and proper repair; but said Terminal Company shall not be bound to make any repairs nor shall it be liable for any failure so to do until after reasonable notice shall be given it by said Young, specifying the particular repairs necessary. Said Terminal Company further agrees to maintain a proper depth of water, not exceeding 25 feet, to accommodate ocean steamers which may wish to load and unload the cotton-seed products aforesaid at said dock.

4.

The said E. H. Young shall have possession and control of said dock and warehouse, and shall pay all laborers and others engaged in operating said warehouse and dock, and in carrying on his business of storing and handling cotton-seed products; and the said Terminal Company shall be exempt from all liability on account of fire; and the said E. H. Young shall maintain all such insurance as he may deem necessary on the contents of said warehouse and dock; and the said E. H. Young further agrees to indemnify and hold harmless the said Terminal Company against any and all liability for accident or injury to himself or any of his employees which may be caused by or arise from any defect or imperfection in the construction or repair of said dock and warehouse, or which shall arise in any way from the construction or condition of said warehouse and dock. Said Young further agrees to indemnify and hold harmless the said Terminal Company against any and all liability for injury to persons or property of every kind, class, and description, which may occur in or about said warehouse and dock, or which may arise in any manner in connection with the use of said warehouse and dock by said Young or his employees, or which may arise in any other manner, except such as may be caused by said Terminal Company, its agents or employees.

5.

In the event said dock and warehouse shall be destroyed or shall be so damaged as to be unfit for use by fire or other casualty,
136 this contract shall thereupon immediately terminate, but said Terminal Company shall have the right, at its option, upon notice of its intention so to do, to be given within thirty (30) days after such destruction or damage, to repair or restore said dock and warehouse within six months from such notice, so as to restore it to its former condition, in which event the contract shall continue in

force for the term herein stipulated, but the rental herein provided for shall be abated proportionately from the time of such destruction and injury until said dock and warehouse shall be so restored.

6.

Neither said Terminal Company nor the owners of engines moving upon the track of said Terminal Company, or upon the tracks herein provided for the use of said warehouse and dock, shall be liable for any damage that may result to the contents of said dock and warehouse by reason of the escape of fire from said engines, unless the same is caused by the willful or wanton neglect of said Terminal Company, or its employees, the risk from fire being one that is in contemplation of the parties hereto, and neither undertakes to indemnify the other against the same.

7.

In consideration of the foregoing undertakings and covenants on the part of said Terminal Company, the said E. H. Young hereby agrees and promises to pay to said Terminal Company as rental for said dock and facilities the sum of fifteen thousand dollars ($15,000) per annum, the payment to be made in monthly installments of twelve hundred and fifty dollars ($1,250) between the 1st and 10th day of each month, beginning with the month of November, 1906, at the office of the treasurer of said Terminal Company in Houston, Harris County, state of Texas.

8.

The said Young further agrees that he will route all shipments of cotton seed and cotton-seed products purchased or shipped by or to him over the lines of said Terminal Company and its connections, according to the instructions of said Terminal Company from time to time, and that he will insist upon and enforce such routing as may be directed or requested of him by said Terminal Company for all cotton seed and cotton-seed products purchased or shipped by or to him in all cases, except where the enforcement of such routing would prevent him from purchasing such cotton seed or cotton-seed products, or from obtaining shipments which are ready to move immediately and for which cars can not be procured for the routing required: *Provided, however,* That the said E. H. Young shall not be bound by the provisions of this article unless the rates are equal to, or lower than, those made by competing lines and the service is adequate: *And provided further,* That the said Young shall give notice to the Terminal Company of rates proposed by such competing line or lines and shall further give said Terminal Company the option of meeting such proposed rates; and in the event that said terminal company elects to do so, then said Young shall not divert such shipments, but shall abide by the provisions of this article.

9.

The party of the second part agrees to maintain the usual standard of order and cleanliness of the party of the first part in and about the

137 premises, and to forbid and prohibit the smoking of pipes, cigars, or cigarettes, and the use of matches or other combustible articles in or about the said leased premises. It is further agreed that the system of watch service and fire-patrol protection which said Terminal Company now has or may hereafter have from time to time for its docks at Galveston shall be extended to and made operative over said dock and warehouse herein leased to said Young, and said Young hereby agrees, in addition to the rental hereinbefore stipulated, to pay said Terminal Company such part of the total cost of said watch service and fire-patrol protection as the number of watch boxes located in and upon said dock and warehouse bears to the total number of watch boxes in use on all of said Terminal Company's docks and property at its wharves at Galveston, but said Terminal Company does not in anywise guarantee the efficiency or sufficiency of said service.

10.

Said Terminal Company shall have the right to terminate this contract at any time after the expiration of five years from the 1st day of November, 1906, by giving said Young six months' notice in writing of its intention so to do.

11.

The failure upon the part of either party hereto to comply with the conditions hereof in any respect shall be cause for the termination of this contract after sixty days' notice of the election to do so. The right, however, hereby conferred is optional and the failure to exercise it at any one time shall not affect its exercise at any subsequent time when occasion arises therefor.

12.

This contract shall not be assignable by the said E. H. Young without the written consent and concurrence of the said Terminal Company. It is expressly stipulated and agreed that all contracts, agreements, and understandings heretofore made by the parties hereto, verbal or written, and especially those contracts of July 10, 1905, and January 9, 1906, shall be, and are hereby, canceled, annulled, and superseded, it being the intent of the parties that this instrument shall supersede and take the place of all others.

Young has been engaged since 1898 in the business of exporting cotton-seed products from various southwestern ports. During the year 1903 he was exporting from Port Arthur, Tex., where no wharfage charge is made, but the facilities offered were not sufficient for the amount of business he desired to do. During the season of 1904 he exported from Sabine Pass, Tex. No wharfage charge is made there, but the Texas & New Orleans Railroad Company, the rails of which reach that port, would not make the repairs of docks and piers he demanded. Late in 1904 he made application to the Galveston Wharf Company to allow him to occupy exclusively one of its piers upon which to store, sack, and grind cotton-seed cake and prepare the same for shipment. That company refused to allow him exclusively

any space on its wharves under an arrangement whereby wharfage charges would be absorbed. He thereupon applied to the Southern Pacific Terminal Company to allow him to use its unoccupied
138 dock, coupled with certain privileges, for an annual charge, and the agreement in question was made with that company.

The Galveston Wharf Company leases spaces on its wharves to various exporters, ship agents, and steamship lines, which have first call upon their use, but none of these leases is exclusive, and the requirement for payment of wharfage charges is in no case waived. In October, 1907, the New Orleans Export Company, engaged in the business of exporting cotton-seed products, rented a single berth on pier 38 of the Galveston Wharf Company, for which it agreed to pay $1,000 per year. Under the terms of the lease the company is given the right to place sacking machines on the pier and to store cotton-seed cake thereon and sack the same for shipment. The lease, however, is not exclusive, and the lessee is required to pay a wharfage charge of 1 cent per 100 pounds for all products handled by it.

In July, 1905, the complainant sought to secure facilities for handling cotton-seed products from the Southern Pacific Terminal Company similar to those granted to Young, but was unable to do so. He was informed that there was no room on the docks then constructed for placing machines for sacking and storing cotton-seed cake, and that if additional dockage and piers were constructed a contract similar in all particulars to that made with Young would be demanded.

Under the terms of his contract Young is now doing business as an exporter of cotton-seed cake and meal from the port of Galveston. He controls space in a covered pier 1,370 feet long, which the Terminal Company erected at a cost of some $65,000 in addition to the cost of the dock. He has placed within the inclosure 20 hydraulic cake-sacking machines capable of sacking 1,500 tons of cake per day, and has erected grinding machines capable of grinding and sacking 200 tons of meal per day. He employs at times as many as 200 men to unload, sack, and ship cotton-seed products. The covered space occupied by him lies alongside a slip into which ships float and tie to the dock. Carloads of cake are switched in on the other side of the dock and the cake is unloaded, sacked, and placed within easy reach of a ship's tackle for expeditious loading.

Young testified that he has the following advantages over any exporter of cotton-seed products from the port of Galveston because of the large capital he employs, his methods of doing business, and the facilities he has on the docks of the Terminal Company:

Say that I receive an order to-day for a cargo of cake from Denmark. I cable my friends that I am working on their order and will wire. I cable my agent in London to offer me a steamer of suitable size and position due thirty or sixty days hence. I receive an offer which carries with it a commission for agent's, or charterer's fee for chartering steamer. I make a counter bid on the steamer and close it. I receive in that instance the charterer's com-
139 mission. I bring that steamer forward, accept the order, and proceed to buy the goods. When the steamer arrives, she

is berthed at the dock, and I proceed to load her in the capacity of stevedore, and I proceed to unload the cars in the capacity of a contractor. I proceed to sack and bag the cake in the capacity of a manufacturer, and for all those offices which I perform I endeavor to make a profit and usually do. I consider that in chartering there is probably a commission on the steamer with the perquisites that go with chartering, including the dispatch in quick loading, for loading and discharging steamers, and the profits on chartering, stevedoring, unloading, grinding, sacking, etc., which is in addition to a merchant's buying and selling profit. I consider there is usually a fair margin there of between 30 and 40 cents per ton, more or less as the occasion may be, which is amply sufficient to justify a man to do business, and this is exclusive of and in addition to the usual profit on the business.

Young is exempt from demurrage charges which accrue after the product remains ten days in the cars or on the wharves. He has all the time he needs to assemble a cargo of the product. After he has shipped 75,000 tons of cake and meal at the rate of 1 cent per 100 pounds charged all other exporters he has no wharfage charge of any kind to pay, and on all his shipments he has other advantages which amount to from 40 to 55 cents per ton.

The rate on cotton-seed products from Texas common points is 17½ cents per 100 pounds to Galveston and 18½ cents per 100 pound- to New Orleans. There are no wharfage charges at New Orleans and the rates are adjusted to equalize the ports. At New Orleans several plants are established where cake may be stored, ground, and sacked for shipment in a manner similar to that used by Young, but it appears that a charge of 10 cents per ton is made for the service, and that at least in one instance such service is furnished by a railroad company.

Most cotton-seed products exported from Galveston are purchased from Texas cotton mills, though some purchases are made from mills in Arkansas, Oklahoma, and Louisiana. Prior to 1905 export business of cotton-seed products was largely confined to cotton-seed meal. Very little cake was shipped in bulk from the mills. Cake for export was sacked at the mills and bought by exporters in that form. Since 1905, and largely through the superior facilities enjoyed by Young and his efforts to that end, mill owners have found it profitable to sell cake in bulk at their mills. The seed is crushed and compressed into cakes by machinery at the mills, loaded into cars, and thus shipped. This method saves the cost of transporting sacks to and from the mills and employment by mill owners of skilled labor to sack the cake.

The demand for cotton-seed cake from abroad was comparatively limited previous to 1904. Consumers in foreign countries preferred to use meal, and exporters shipped accordingly. In the years 1904 and 1905 there arose a brisk demand from Denmark and
140 Germany for cotton-seed cake, especially the Texas product. Consumers preferred shipments of sacked cake to shipments of meal, and purchases thereof in the two countries are now very

extensive. There is no local consumption of cake at Galveston, and all that is transported there is for export.

The Southern Pacific Company is a holding corporation organized under a special charter of the state of Kentucky in 1884. It is authorized by its charter to acquire by purchase or otherwise stocks, bonds, and securities of railway and steamship companies. Through ownership of stock this company now has a controlling interest in the entire Southern Pacific System, including the Galveston, Harrisburg & San Antonio Railway; Texas & New Orleans Railroad; Houston & Texas Central Railroad; Houston, East & West Texas Railway, and Houston & Shreveport Railroad. It owns and controls a line of steamships from Galveston and New Orleans to New York and Habana. It also owns practically all the stock of the Southern Pacific Terminal Company. The Southern Pacific Company; Galveston, Harrisburg & San Antonio Railway Company; Texas & New Orleans Railroad Company, and Southern Pacific Terminal Company have the same president and in many instances the same officers of lesser rank. The same man is general manager of the Galveston, Harrisburg & San Antonio Railway and the Terminal Company. The Southern Pacific Company received $239,952 in dividends on stock held by it of the Southern Pacific Terminal Company for the year ending June 30, 1907.

All exporters of cotton-seed cake and meal from the port of Galveston, except Young, are required to pay the published wharfage charge of 1 cent per 100 pounds. When an exporter has occasion to buy his shipment of Young, and the product passes over the latter's rented pier, a wharfage charge of 1 cent per 100 pounds is exacted by and paid to him. No other exporter can make the same saving in loading and unloading charges because of lack of room to store and handle the cake and meal. Room for the purpose of furnishing exporters generally with facilities enjoyed by Young can not be obtained on the water front in Galveston under existing conditions. An exporter with limited capital, who does a comparatively small business, is under all the circumstances unable to continue with any assurance of profit from his efforts.

Since 1905 the business of all other exporters of cotton-seed products in Galveston has shrunk to small proportions in comparison with the amount of business done by Young. Many exporters have abandoned the business. Young is able to and does pay more for bulk cake and meal at the mills than his competitors can
141 afford to pay. He also sells the sacked cake and meal to consumers abroad at lower prices than his competitors can afford to offer.

The following table shows comparative shipments of cotton-seed cake from the port of Galveston over the wharves of the two companies for the years 1904 to 1907, inclusive, expressed in pounds:

Shipment of Cotton-seed Cake from the Port of Galveston.

Year.	Galveston Wharf Company.	Southern Pacific Terminal Company.
	Pounds.	*Pounds.*
1904	21,493,935	None.
1905	12,796,800	44,108,086
1906	16,442,293	107,437,896
1907	21,084,477	211,425,667

From September 1, 1906, to September 1, 1907, Young exported from the port of Galveston about 105,000 tons of cotton-seed cake and about the same amount of cotton-seed meal. All other exporters in Galveston did not ship to exceed 50,000 tons of both products during the same period. Exports of these products from New Orleans, Port Arthur, and Sabine Pass have decreased in a marked degree since 1904. In accordance with the terms of the lease, Young, at the request of the Terminal Company, has routed all shipments of cotton-seed products, wherever possible, over railroads in which the Southern Pacific Company is largely interested. The other railroads entering Galveston have during the last two years transported comparatively small amounts of cotton-seed products. The Galveston Wharf Company has during the same period experienced a large decrease in revenue from this source.

Cotton mill owners throughout Texas complain that their market for the sale of cotton-seed products is now dominated by Young, and that he depresses prices abroad. An association of about 108 mill owners in Texas was formed sometime in August, 1907, for the purpose of engaging in the business of exporting cotton-seed products with a view to extending the selling market abroad and stimulating the buying market at home. It was found by the managers of the association that they were not in a position to compete with Young. He would not assign to the association his agreement with the Terminal Company except upon the consideration of $50,000 bonus and payment for all his improvements. Officials of the Terminal Company were asked by the managers of the association if similar space to that occupied by Young would be furnished them for the purpose of handling and exporting cotton-seed products. They re-
142 plied that they would not be able to construct additional docks and an additional pier in less time than a year, and that they would require a lease under the same terms and conditions as that given to Young.

The Terminal Company owns unoccupied ground upon which two additional docks and piers of the size occupied by Young might be constructed, and it is insisted by the company that it stands ready to construct the same, provided responsible parties will enter into

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contracts for their occupancy for five years and under the conditions of the contract with Young.

Cotton-seed products are bought at mills in the interior, usually f. o. b. at the mill, and are shipped to exporters at Galveston on local bills of lading. Shipments abroad from Galveston are made through ship agents or on contract with tramp or other steamers. Ships of the Southern Pacific Company which ply between New York and Galveston tie up at the Terminal Company's wharf only. Railroads in which the Southern Pacific Company has the controlling interest extend from Galveston to New Orleans on the east, to San Francisco on the west, and reach all important points in east, central, and southern Texas.

It appears that ample facilities for shipment of all products from the port of Galveston are furnished by the two wharf companies. Wharves and piers extend along the bay front for more than 3½ miles, and the facilities for loading and unloading are exceptional, compared with facilities at other ports of the country. Galveston now occupies first rank among ocean ports of the United States in exports of cotton and cotton-seed products, and occupies no mean position with respect to the quantity of exports of various other commodities. At this port export products have ten days free time on cars or wharves. Unloading charges to the amount of 12½ cents per ton are absorbed by the railroads, and charges averaging 30 cents per ton for loading into ships are paid by shipowners. So far as the record shows room for storing and appliances for sacking and grinding cotton seed cake and meal are not furnished by the carriers for the use of shippers free of charge at any other port in the United States.

Complainant testified that between January, 1905, and January, 1907, he lost about $35,000 in attempting to do export cotton-seed product business in competition with Young. This amount covered office expenses, telegrams and cablegrams, and losses on shipments, and extracts from his books apparently corroborate this testimony. He stated that early in 1905 he had money in bank, and that January 1, 1907, he owed to banks in this country and in Europe more than $35,000.

It is contended in behalf of the defendants that the Southern Pacific Company and the Terminal Company are not com-
143 mon carriers and therefore are not subject to the jurisdiction of the Commission. The former, defendants urge, is a holding company, and the latter a wharfage company, and neither is engaged in the business of transportation. Considered alone, neither comes within the definition of a common carrier. There is no doubt, however, that the railroad and steamship lines forming the so-called Southern Pacific system are one in control and operation. They are all owned by the Southern Pacific Company. The holding company and the companies owned by it have, generally speaking, the same officers, and in cases where this is not so the managing officers are such as to assure that the interest of the whole will be subserved by the acts of each constituent part. The Terminal Company was organized to furnish terminal facilities for the system at the port of

Galveston, and the land upon which its docks and wharves are erected and maintained was granted to its predecessor, as expressed in the act of the Texas legislature, for the purpose of supplying such facilities. As above stated, the Southern Pacific Company owns and controls lines of railroad reaching from New Orleans to San Francisco and Galveston and a steamship line from the latter place to New York and Habana. Through shipments on these lines from and to points in different states of the Union pass and repass over the docks of the Terminal Company. It forms a link in this chain of interstate transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation.

It is also urged that inasmuch as the Terminal Company is not owned by the railroad company with which the tracks on its dock connect, it can not be held to be a part of that or any other railroad carrier. We are constrained to reject this contention. It does not appear to make any difference whether or not the connecting railroad company owns the Terminal Company if the ownership of both is vested in the same corporation. Control is an incident of ownership, and, as a matter of fact, the Southern Pacific Company, the Terminal Company, and the Galveston, Harrisburg & San Antonio Railway Company have the same president. The last two have the same general manager, who occupies that position with all the Texas roads of the system. The interests of the railroad and steamship lines of the system transporting shipments to and from Galveston are identical. The money earned and dividends paid inure to the one owner.

That the management of the Terminal Company considered its relation identical with the railroads embraced in the system is abundantly established by examination of the eighth article of the contract made with Young. Therein Young agreed to route all his shipments over "the lines of said Terminal Company and its
144 connections, according to the instructions of said Terminal Company from time to time." It is further provided that unless the rates of these lines are equal to or lower than those made by competing lines Young shall not be bound to so route his shipments, but he is required to give "notice to the Terminal Company of rates proposed by such competing line or lines and shall further give said Terminal Company the option of meeting such proposed rates; and in event that said Terminal Company elects to do so, then Young shall not divert such shipments, but shall abide by the provisions of this article." A corporation such as this Terminal Company, which has "connecting lines" and which has power to meet rates made by "competing lines," should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company.

It is true that the different corporations under consideration are operating under separate and distinct charters, but, nevertheless, they constitute a single system. To complete that system the Terminal Company is a necessary part. Shipments over the Southern Pacific System, not for export, but from and to different states in

the Union, all pass over the docks of the Terminal Company. It is conceded that the railroad companies carrying interstate shipments to and from Galveston though owned by the Southern Pacific Company are subject to our jurisdiction, but the contention is made that the point where the railroad lines end and the tracks of the Terminal Company begin is the point beyond which the power of the Commission does not extend. We can not yield assent to this proposition. The Terminal Company is part and parcel of the system engaged as a whole in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all their terminals and terminal facilities from our regulating authority.

The act in its first section includes in the term "railroad" "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property." The rails of the Galveston, Harrisburg & San Antonio Company connect with tracks upon the docks of the Terminal Company. The former delivers cars loaded with interstate freight to the latter. The only terminal the roads
145 of the Southern Pacific System have in Galveston for the delivery and transfer of freight moving over its lines is that furnished by the Terminal Company. It is true that the latter collects a trackage charge from the former and that the railroad company collects a switching charge from the Terminal Company. These charges are, however, but incidents of the separate corporate operations.

The Commission is not concluded by the form but looks to the substance of the relations between corporations engaged in interstate commerce. The Terminal Company for the purposes here in question is part of the Galveston, Harrisburg & San Antonio Railway Company. It is a necessary element in and facility of the interstate transportation in which the Southern Pacific System is engaged, and as such is believed to be subject to our jurisdiction. The cases cited and relied upon by counsel for defendants do not, in our judgment, support a different conclusion.

This brings us to the question whether Young has been given undue or unreasonable preference or advantage, and other shippers from the port of Galveston subjected to undue or unreasonable prejudice or disadvantage by acts of the defendants, in violation of the third section of the act.

It is argued in behalf of the Terminal Company that it has supplied and maintains ample terminal facilities for the Southern Pacific System and the use of the public, aside from the premises leased to Young, and that it has the right under its charter to grant to him

to be used for any purpose that portion of its property which otherwise, it is said, would be unoccupied and unproductive.

If the title of the Terminal Company to the land possessed by it on the water front in Galveston were held in fee simple, this contention might be tenable, because we know of no restriction upon the alienation of real estate merely because the owner is a corporation. But this company was organized, as shown by its charter, for the express purpose of availing itself of and enjoying "the properties, rights, privileges and franchises granted and described and referred to in the act of the legislature of the state of Texas" approved May 1, 1899. This act is entitled "An act ratifying and confirming an ordinance passed by the city council of the city of Galveston on the 4th of February, 1899, entitled 'An ordinance abandoning, discontinuing, and closing certain streets, avenues, and alleys of the city of Galveston and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the city of Galveston upon certain specified conditions,' and conditionally relinquishing any claim the state of Texas may have to part of the property therein described."

146 Huntington was authorized specifically to "construct and maintain upon said property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship systems, their successors or assigns, also to buy, lease, receive, own, hold, and enjoy real and personal property necessary in the transaction of its business."

The land now owned by the company is apparently charged with the public use expressed in the grant to Huntington. The latter had a conditional title and could convey to the former no greater rights than he possessed. The language in the articles of incorporation which purports to give to the Terminal Company power to "lease and convey warehouses, docks, and wharves" is not effective to change the character of the grant. The land having been granted for a specific purpose of public import and necessity can not, we believe, be disposed of in such manner as to defeat that declared purpose.

The company could doubtless assign its right to this land to be used by the grantee for wharfage purposes, but we are of the opinion that it can not be transferred to be used for a purely private purpose, particularly to a shipper who thereby obtains an unjust advantage over other shippers. If we are right in this construction of the original grant and its effect upon the title of the Terminal Company, the contention that the latter may dispose of this land absolutely as other land held in fee simple can not be upheld. Moreover, we think it open to serious question whether the contract with Young is in any proper sense a "lease" of the premises he occupies. True, it purports to lease to him "a certain dock and warehouse, with shed, platform, and tracks thereon," but an examination of its provisions shows that this contract was intended to give, and actually does give, Young only certain privileges on a covered pier 1,370 feet long. For the use of the tracks along the dock on which this pier is erected the

Galveston, Harrisburg & San Antonio Railway Company pays the Terminal Company 50 cents per loaded car, and the Terminal Company pays to the railroad company $1.75 per car as a switching charge. Young does not receive the revenue arising from the use of the tracks on the dock, nor does he pay for switching cars onto those tracks.

In respect to these matters he is in no different situation from any other shipper from the port of Galveston. There would appear to be no room for doubt that, had he been given a lease of the dock on which the pier he occupies was erected, trackage charges would inure to him and that he would be required to pay switching charges. Under the contract he has been given control of certain space on a covered pier erected on a dock belonging to the Terminal Company.

He has not been put in possession or control of the dock or
147 improvements thereon, except the covered space. It is quite apparent that the moving consideration for the contract, so far as the Terminal Company is concerned, is the right to route Young's shipments over its "connecting lines"—that is, the lines of the Southern Pacific Company. The amount Young has paid and is to pay, as specified in the contract, is probably no more than a fair rate of interest on the cost of the dock and the improvements put thereon for his use. If the Terminal Company had received from Young, for the year 1907, the wharfage charge of 1 cent per 100 pounds on the shipments made by him it would have received nearly $30,000 more than the amount specified in the contract. Without compensating benefits the contract might have been a losing speculation to the company.

It was made to induce shipments over the lines of the system of which it is a part. The contract is to be considered with respect to its effect on Young's interests as a shipper and the Terminal Company's interest in transportation. It was not made for the purpose of giving Young possession and control of a dock for his own use, but by its terms and conditions was designed to secure to the Terminal Company and allied interests control of the transportation of the product of a great industry. Young desired to do a large export cotton-seed product business at the port, and the system desired to secure the transportation of such product. To accomplish these ends the contract was made, and it is in the light of this condition that it must be considered. The system has the undoubted right in competition for transportation business to secure to itself all the shipments it can legitimately, but in doing so it can not unduly prefer or prejudice any shipper.

As a practical matter shippers of cotton-seed cake and meal from the port of Galveston can not secure facilities on the same conditions as those granted to Young from the Terminal Company, nor can such facilities be secured elsewhere on the bay front. The contract in question gives to Young exclusive advantages, and he in turn, so far as he can, makes shipments exclusively over the lines of the system. The acts of the officials of the Terminal Company indicate that they are not willing to accord shippers generally the facilities they give to Young, and the situation at their docks with respect of

space is such that they could not do so even if they were willing. It seems entirely probable that Young as a prudent business man would not have entered into this contract and expended the money necessary to equip his plant to do the large business he has enjoyed except upon the expectation that he would have some advantage over other shippers by reason of the exclusive privileges he secured from the Terminal Company. Even without these exclusive privileges he would doubtless have carried on an extensive business, but it
148 is hardly to be supposed that he would have been able to get practically all of it if other dealers had been placed upon the same footing.

For it is to be kept in mind that Young is a shipper. He is entitled to no more and to no less from these defendants than any other shipper, since the Terminal Company as part of the Galveston, Harrisburg & San Antonio Railway owes a duty to the entire shipping public. In the case of *Castle* v. *Baltimore & Ohio Railroad Company*, 8 I. C. C. Rep., 333, the Commission said:

Common carriers are bound by every principle of justice and law to accord equal rights to all shippers who are entitled to like treatment, both in the receiving of supplies and the shipment of their products, and a carrier who, under any pretext whatsoever, grants to one shipper an advantage which it denies another violates the spirit and thwarts the purpose of the law.

It follows that if the Terminal Company may make a contract with Young as a shipper of cotton-seed cake and meal, giving him thereby certain exemptions or privileges which it can not or does not give to other shippers of the same commodities, it may also make similar contracts with regard to cotton or other products and thus secure to favored shippers the control of the export business of the port of Galveston. Whatever power under its charter the company may have to convey or lease its property generally does not, in our opinion, give it authority to enter into a contract under the operation of which one shipper is preferred over another. The giving of undue preference or advantage to any shipper is condemned by the statute, and it can make no difference that such preference is given by a contract which purports to be a lease of property. To hold otherwise would in effect sanction a device to evade the law.

The result of the operation of the contract with Young has been to center in him practically all the cotton-seed product export business of Texas and adjoining states. It may be that this has been beneficial to the cotton-seed interests of the southwest; that better prices have prevailed; and that more economical methods of doing the business have been inaugurated. This is no doubt partially true. Reasons readily suggest themselves, however, in addition to the statutory inhibition of undue preference to any shipper, why it is not to the permanent interest of this great and growing industry to have the transportation of its products to foreign markets and the buying and selling thereof at home and abroad controlled by one man. Domination of the cotton-seed products market of Texas and adjoining states by Young or any other individual might speedily become an injurious and indefensible monopoly.

It is argued further that the facilities enjoyed by Young are not those which it is the duty of any carrier to furnish shippers, that sacking and grinding cake are manufacturing processes, and
149 that Young has the right to conduct a manufacturing business wherever he can secure room to place his plant. There is no doubt that each of these propositions considered by itself is theoretically correct. But the Terminal Company has relieved Young from wharfage charges which it exacts of all other shippers, and it has contracted to give him use of room on its docks to store his products and sack and grind them which it can not give or declines to give to other shippers. In short, he receives advantages with respect to the shipments of his finished products by virtue of his contract which may not lawfully be accorded to him although he is a manufacturer.

The contention is also made that Young's foresight, which has directed the cotton-seed product business into new channels by means of new methods, his business ability and his use of large capital, enabled him to take the business from his competitors, and not the contract with the Terminal Company. The answer to this is that Young's ability in less than two years of operation under the contract to do nine-tenths of all the export cotton-seed product business of the port of Galveston primarily arises from and is due to an exemption from wharfage charges and the facilities which are given to him exclusively. Room to store cake and assemble a shipload is furnished to Young and to no one else. Facilities of like kind for loading and unloading cars and loading ships are given to Young and to no one else. This results in an undue preference, as we believe, contrary to the principle of equality which the law seeks to enforce.

The Joint Circular I. C. C. No. 475, published and filed, effective November 30, 1904, showing "Terminal charges at the port of Galveston, Tex.," names, among other parties thereto, the Galveston, Harrisburg & San Antonio Railway and the Southern Pacific Terminal Company, and it is shown thereon that the above-named and certain other railroads comprise the "Sunset Route." The Terminal Company appears as a party to like circulars issued as late as April 15, 1907. In the joint circular effective May 24, 1907, I. C. C. No. 645, issued by the Galveston, Harrisburg & San Antonio Railway, the Terminal Company does not appear as a party. The circular of May 24, 1907, shows "Terminal charges (other than storage and switching) at the port of Galveston, Tex., applying on both domestic and foreign traffic." In this circular, as in all prior ones, appears the charge of 1 cent per 100 pounds on cotton-seed cake and meal. The Terminal Company is a part of the Galveston, Harrisburg & San Antonio Railway Company, and therefore the contract with Young, in so far as it exempts him from wharfage charges, is a departure from the published tariffs of the carriers.

Under the circumstances shown by the record we are of opinion
150 that the defendants, the Southern Pacific Company, the Southern Pacific Terminal Company, and the Galveston, Harrisburg & San Antonio Railway Company, give to E. H.

Young, a shipper of cotton-seed products from the port of Galveston, undue preferences and advantages in exempting him from the payment of wharfage charges on his shipments which are exacted from all other shippers and in furnishing him for his exclusive use space on the docks of the Terminal Company to store and handle cotton-seed cake and meal, which they at the same time refuse to furnish other shippers under like circumstances. We find that the giving of such preferences and advantages is unlawful.

It does not appear that the Missouri, Kansas & Texas Railway Company of Texas; Galveston, Houston & Henderson Railroad Company of 1882; Gulf, Colorado & Santa Fe Railroad Company, and International & Great Northern Railroad Company were parties to or have any interest in the contract with Young, and the complaint as to them will be dismissed.

There is no evidence in this record upon which reparation can be awarded, and complainant may be unable to make the requisite proof, but he may send to the Commission, if he so desires, on or before August 15, 1908, an itemized statement or bill of particulars of the damages he claims to have sustained, with sufficient copies for service on the defendants against which the order in this case is directed. In case such bill of particulars is filed within the time named, the complainant will have opportunity, upon notice to said defendants, to make proof of the facts stated therein, before a special examiner or otherwise as may be arranged, and said defendants will have opportunity at the same time to introduce evidence in opposition to complainant's proofs. Upon such supplemental record, if one be made, the question of reparation will be further considered.

An order will be entered directing the defendants to cease and desist from the practices herein found to be unlawful.

151 *Replication of Plaintiffs.*

In the Circuit Court of the United States for the Southern District of Texas.

In Equity. No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Company
vs.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

Replication of Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, Complainants, to the Answer of the Interstate Commerce Commission, Defendant.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer

of said defendant, Interstate Commerce Commission for replication thereunto say.

That they and each of them do and will ever maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by said defendant, Interstate Commerce Commission, and

That the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove as this honorable court shall direct, and humbly as in and by their said bill they have already prayed.

152 SOUTHERN PACIFIC TERMINAL COMPANY,
By BAKER, BOTTS, PARKER AND GARWOOD,
Solicitors.
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By BAKER, BOTTS, PARKER AND GARWOOD,
Solicitors.
SOUTHERN PACIFIC COMPANY,
By WM. F. HERRIN, *Solicitor.*
F. C. DILLARD,
Of Counsel.

(Endorsements:) In the Circuit Court of the United States for the Southern District of Texas. Southern Pacific Terminal Co. Southern Pacific Company Galveston, Harrisburg & San Antonio Ry. Co. vs. Interstate Commerce Commission and E. H. Young, In Equity. No. 504. Replication of Plaintiffs. Filed Jany. 8, 1909. C. Dart, Clerk, by G. Predecki, Deputy.

153 *Order Extending Time to Complainants Within Which to Take Testimony.*

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL CO. et al.
vs.
INTERSTATE COMMERCE COMMISSION et al.

It being made to appear to the Court that by agreement between the parties the time within which testimony may be taken by complainants may be extended it is ordered that complainants be and they are hereby allowed an additional period of ninety days within which to take testimony.

W. T. BURNS, *Judge.*

(Endorsements:) No. 504. Equity. Southern Pacific Terminal Co. et al. vs. Interstate Commerce Commission, et al. Order extending time to complainants within which to take testimony. Filed March 16, 1909. C. Dart, Clerk, by G. Predecki, Deputy.

154 *Agreement Extending Time for Taking Testimony.*

In the United States Circuit Court for the Southern District of Texas.

No. 504. Equity.

SOUTHERN PACIFIC TERMINAL CO. et al., Complainants,
vs.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

It is stipulated by and between the parties hereto, through their respective solicitors, that the time for taking the testimony on behalf of complainants may be extended ninety days from the date of the last extension, defendants to have sufficient time after the complainants have rested their case in which to introduce their testimony.

F. C. DILLARD,
BAKER, BOTTS, PARKER AND GARWOOD,
Solicitors for Complainants.
LUTHER M. WALTER,
Solicitor for Defendant
Interstate Commerce Commission
MACO STEWART,
Solicitor for Defendant E. H. Young.

(Endorsements:) Southern Pacific Terminal Co. et al., Complainants, vs. No. 504 Equity. Interstate Commerce Commission and E. H. Young, Defendants. Agreement extending time for taking testimony. Filed June 8, 1909. C. Dart, Clerk, by G. Predecki, Deputy.

155 In the United States Circuit Court for the Southern District of Texas.

In Equity. No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
versus
INTERSTATE COMMERCE COMMISSION et al.

Agreed Statement of Facts.

Baker, Botts, Parker & Garwood, F. C. Dillard, Solicitors for Complainants; Luther M. Walter, Solicitor for Interstate Commerce Commission; Maco Stewart, Solicitor for E. H. Young.

Filed Sept. 23, 1909. C. Dart, Clerk, by G. Predecki, Deputy.

156 In the United States Circuit Court for the Southern District of Texas.

In Equity. No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al., Complainants,
versus
INTERSTATE COMMERCE COMMISSION et al., Defendants.

Agreed Statement of Facts.

It is stipulated by and between the parties hereto that the following constitute the facts upon which this cause may be submitted for final decree:

I.

The allegations of paragraph I of the bill of complaint are true.

II.

The allegations of paragraph II of the bill of the complaint are true.

III.

The allegations of paragraph III of the bill of complaint are true.

IV.

The Southern Pacific Terminal Company is a corporation, organized and existing under the laws of the State of Texas. Its
157 articles of incorporation of date July 6, 1901, include the following, which state all the purposes of and contain all the powers granted to said corporation:

"The purposes for which this corporation is formed are to con-"struct, buy, lease, own, maintain, operate, and convey warehouses, "docks, and wharves, and grain elevators, including the construction, "owning, and operating docks on the coast of this State for the pro-"tection and accommodation of ships, boats, and all kinds of ves-"sels for navigation and their cargoes, and to avail of, use, and en-"joy the properties, rights, privileges, and franchises granted and de-"scribed and referred to in the act of the legislature of the State of "Texas entitled 'An act ratifying and confirming an ordinance " 'passed by the city council of the city of Galveston, on the 4th day " 'of February, 1899, entitled "An ordinance abandoning, discon-" " "tinuing, and closing certain streets, avenues, and alleys, of the " " "city of Galveston and authorizing and empowering Collis P. " " "Huntington, his heirs or assigns, perpetually to construct and " " "maintain piers on the shore of Galveston Bay within the cor-" " "porate limits of the city of Galveston upon certain specified con-" " "ditions," and conditionally relinquishing any claim the State " 'of Texas may have to part of the property therein described,' ap-"proved May 1, 1899, and in the ordinance set forth in the pream-"ble of said act, including the right to construct and maintain piers

"upon the said property described by metes and bounds in said ordi-
"nance, and upon the property lying and situated between the same
"and the Galveston Harbor line of 1897, and to dredge between and
"on the sides of such piers and northerly and northeasterly there-
"from and from said harbor line of 1897 so as to permit the securing
"of at least 25 feet of water at mean low water between and beside
"such piers, and northerly and northeasterly therefrom, and so as
"to secure a connection by a continuous channel 25 feet in depth
"at mean low water from said piers to the Gulf of Mexico, and to
"permit steamers of at least 500 feet in length and 50 feet
158 "beam and drawing at least 25 feet of water to conveniently
"go at mean low water from the waters of the Gulf of Mex-
"ico to and lie alongside of said piers and to maintain the same,
"and to construct and maintain upon said property terminal facili-
"ties for the use of what are commonly called the 'Southern Pacific
" 'Railroad and Steamship Systems,' their successors or assigns, also
"to buy, lease, receive, own, hold, and enjoy real and personal prop-
"erty necessary in the transaction of its business.

"Pursuant to the provisions of the act approved May 1, 1899, above
"referred to, section 2 of said act is hereby incorporated herein:

"SEC. 2. The said Collis P. Huntington, his heirs or assigns, or
"the person, company, or corporation owning or controlling the above
"described property and all the improvements thereon situated, shall
"never consolidate said property or the stock or the franchise of such
"corporation as may own or control the same with the stock or prop-
"erty of the Galveston Wharf Company, or any company or corpora-
"tion succeeding to the rights of the said Galveston 'Wharf Company,'
"nor shall the owner of said property enter into any agreement with
"the Galveston Wharf Company, its successors or assigns, or any
"other wharf company which may now exist or which may be here-
"after organized, by which the wharf or other terminal charges shall
"be regulated or fixed; and this inhibition upon the said Collis P.
"Huntington, his heirs or assigns, or the person, company, or cor-
"poration owning or controlling the above-described property and all
"the improvements thereon situated, shall also apply to the prop-
"erty now owned by the Gulf, Colorado & Santa Fe Railway Com-
"pany between Fourth and Tenth streets, as shown by the Galveston
"City Company's map of the said city of Galveston. Nor shall any
"person owning or holding any interest in the form of stock or
"otherwise in the property hereinbefore described own or hold any
"interest in the form of stock or otherwise in the wharf or bay front-
"age between Fourth and Forty-first streets, as now shown by the
"Galveston City Company's map of said city of Galveston,
159 "and all sales, conveyances, and transfers of whatsoever char-
"acter in violation of this section shall be null and void, the
"object of this section being to keep the control, ownership, or man-
"agement, direct or indirect, of the property hereinbefore described,
"and the control, ownership or management of the wharf or bay
"frontage between the said Fourth and Forty-first streets entirely
"distinct and independent of each other. And no charter formed
"for the use, operation, and management of the property hereinbe-

"fore described shall be granted unto the said Collis P. Huntington "or his assigns unless this section be incorporated therein, and all "certificates of stock that may be issued by the company formed for "the use, operation, or management of the property hereinbefore "described shall also contain this section on the back thereof.

"SEC. 3. The business of this corporation shall be transacted in "Galveston County, Texas, and its principal office and domicile shall "be located in the city of Galveston, in said county.

"SEC. 5. The general management of the affairs of this corpora- "tion shall be vested in a board of five directors, and those appointed "directors for the first year, are:

"Charles H. Tweed, who resides in New York City, New York.

"E. H. Harriman, who resides in New York City, New York.

"W. G. Van Vleck, who resides in Harris County, Texas.

"R. S. Lovett, who resides in Harris County, Texas.

"C. B. Seger, who resides in Harris County, Texas."

By amendment the capital stock of the Southern Pacific Terminal Company has been increased to $2,000,000.

The Southern Pacific Company is a corporation organized and existing under the laws of the State of Kentucky. Sections 1, 2, 6 and 8 of the incorporating Act of March 17, 1884, of the General Assembly of Kentucky provide as follows:

"SECTION 1. That Henry D. McHenry, William G. Duncan,
160 "Samuel E. Hill, Samuel M. Cox, Henry McHenry, Jr., and "their associates and successors and assigns be, and they are "hereby created and constituted a body corporate and politic under "the name of the Southern Pacific Company, and as such shall have "perpetual succession, and be capable in law to purchase, grant, sell "or receive, in trust or otherwise, all kinds of personal and real "property, to such amount as the Directors of said Company may "from time to time determine; and to contract, and be contracted "with, sue and be sued, plead and be impleaded, appear and prose- "cute to final judgments all suits or actions at law or in equity in "all Courts and places, and to have and use a common seal, and to "alter the same at pleasure, and to make and establish such by-laws, "rules and regulations for the government of said Company and "the conduct of its business as said corporation, or the stockholders "therein, shall deem expedient or necessary for the management of "its affairs, not inconsistent with the Constitution and laws of this "State or of the United States; and generally to do and execute all "acts, matters and things which may be deemed necessary or con- "venient to carry into effect the powers and privileges herein granted; "provided, however, that said corporation shall not have power to "make joint stock with, lease, own or operate any railroad within "the State of Kentucky."

"An Act to Amend 'An Act to Incorporate Southern Pacific Com-
"'pany,' Approved March Seventeenth, Eighteen Hundred and
"Eighty-Four.

"Be it enacted by the General Assembly of the Commonwealth
"of Kentucky:

"SECTION 1. That the Act entitled, 'An Act to incorporate the
"'Southern Pacific Company,' which was approved March seven-
"teenth, Eighteen Hundred and Eighty-four, be and the same is
"amended by adding to Section 1 thereof the following words,
"to wit: except subject to and—conformity with the provisions of
"the laws of the State of Kentucky applicable to Railroads, and ac-
"quiring no special rights that may be possessed by any railroads
"in the State except the general and ordinary rights of com-
161 "mon carriers as possessed by railroads generally.

"SEC. 2. This Act shall take effect from its passage.

"Approved March 21, 1888."

"SEC. 2. The said corporation is hereby authorized and empow-
"ered to contract for and acquire, by purchase or otherwise, bonds,
"stocks, obligations, and securities of any corporation, company
"or association now existing, or hereafter formed or constituted, and
"bonds, obligations and securities of any individuals, State, Terri-
"tory, government or local authorities whatsoever, and to enter into
"contracts with any corporation, company or association, individ-
"uals, State, Territory, government or local authorities, in respect
"of their bonds, stocks, obligations and securities; or in respect of
"the construction, establishment, acquisition, owning equipment,
"leasing, maintenance or operation of any railroads, telegraphs or
"steamship lines, or any public or private improvements, or any
"appurtenances thereof, in any State or Territory of the United
"States, or in any foreign country; and to buy, hold, sell and deal
"in all kinds of public and private stocks, bonds and securities; and
"said corporation may borrow and loan money, issue its own bonds
"or other evidences of indebtedness, and sell, negotiate and pledge
"the same to such amounts, upon such terms, and in such manner
"as may from time to time be determined by the Directors of said
"corporation, and it may mortgage all, or any part, of its property,
"assets and franchises to secure such bonds and the interest thereon,
"on such terms and conditions as shall on that behalf be prescribed
"by its Board of Directors."

"SEC. 6. The stock, property, and affairs of said corporation
"shall be managed by a Board of Directors of such number, not
"less than three, as may be from time to time determined
"by the corporators or stockholders. The Directors shall be
"elected by the stockholders at such time and place, and in
"such manner, and for such terms, as the stockholders shall
"from time to time determine. Meetings of Directors or stock-
"holders may be held within or without the State. No person
162 "shall be elected a Director who is not a stockholder of the
"corporation. A majority of the Directors shall constitute

"a quorum of said board for the transaction of business. The Di-
"rectors shall appoint from their own number a President, and they
"shall also appoint a Clerk and Treasurer, and such other officers
"and agents as they may deem proper, to hold their offices during
"the pleasure of the Board. In case of a vacancy or vacancies in
"the Board, the remaining Directors may fill such vacancy or vacan-
"cies. The capital stock of said corporation may be increased from
"time to time to such sum as may be determined by the Board of
"Directors of said corporation, provided such increase or diminution
"shall be approved by at least two-thirds in interest of the stock-
"holders of said corporation."

"SEC. 8. The Company shall keep an office for the transaction
"of business, and the Clerk, or assistant clerk, of said corporation
"shall reside within the State of Kentucky; but the said corporation
"may keep offices at such places outside of this State as, in the judg-
"ment of its Board of Directors, its business may from time to time
"require. Provided that nothing herein contained shall be con-
"strued as granting any lottery or banking privileges."

V.

The Galveston, Harrisburg & San Antonio Railway Company is a corporation duly and legally incorporated under the laws of the State of Texas as a railroad corporation. For 25 years or more it has existed as such corporation and since prior to the year 1898 it has had its own line of railroad extending from the City of Galveston, in the State of Texas, to the City of El Paso, in said State.

VI.

The Houston & Texas Central Railroad Company is a corporation duly and legally incorporated under the laws of the State
163 of Texas as a railroad corporation. For more than 20 years past it has existed as such corporation with a line of railroad extending from the City of Houston, in the State of Texas, to the City of Denison, in the State of Texas. At the City of Houston it connects with the Galveston, Harrisburg & San Antonio Railway, which, as aforesaid, extends into the City of Galveston.

VII.

The Houston, East & West Texas Railway Company is a corporation duly and legally incorporated under the laws of the State of Texas as a railroad corporation. It has existed as such for more than thirty years. It extends from the City of Houston, in the State of Texas, into Shreveport, in the State of Louisiana.

At the time of the incorporation of the Terminal Company the following were currently referred to as the "Southern Pacific Railroad and Steamship System": The line of steamships hereinafter in this paragraph mentioned, Morgan's Louisiana & Texas Railroad & Steamship Company, The Louisiana Western Railroad, which leads from New Orleans to Sabine River, the Texas & New Orleans

Railroad, leading from the said river to the City of Houston, the Galveston, Harrisburg & San Antonio Railway, and the railroads in which the Southern Pacific Company owns stock, extending from the connection of the latter in El Paso at the Rio Grande River to San Francisco. Each of said railways was incorporated as a separate and distinct railway and has its own officers and Board of Directors,

The Southern Pacific Company during the year ending June 30, 1908, owned and now owns 99 per cent of the capital stock
164 of the Houston, East & West Texas Railway Company, 99 per cent of the capital stock of the Houston & Shreveport Railroad Company, 99 per cent of the capital stock of the Houston & Texas Central Railroad Company, 100 per cent of the capital stock of Morgan's Louisiana & Texas Railroad & Steamship Company, 99 per cent of the capital stock of the Galveston, Harrisburg & San Antonio Railway Company, 99 per cent of the capital stock of the Texas & New Orleans Railroad Company, and 99 per cent of the capital stock of the Southern Pacific Terminal Company; and owns a line of steamships plying from New York to Galveston and New Orleans and also plying between New Orleans and Havana. Substantially the same relation of ownership has existed since January 1, 1905. E. H. Harriman is president of the Southern Pacific Company, the Texas & New Orleans Railroad Company and the Southern Pacific Terminal Company. W. G. Van Vleck is General Manager of the Galveston, Harrisburg & San Antonio Railway Company, Southern Pacific Terminal Company, and the Texas & New Orleans Railroad Company. During the year ending June 30, 1907, the Southern Pacific Company received $239,952.00 as dividends on stock held by it of the Southern Pacific Terminal Company, and during the year ending June 30, 1908, $359,928.00.

VIII.

All traffic which is carried by said railways into Galveston for movement from Galveston by the steamships of the Southern Pacific Company passes over the wharves of the Terminal Company; likewise all traffic which is moved into Galveston by said steamship lines for movement out over the lines of said railways also
165 passes over the wharves of said Terminal Company. Traffic passing into Galveston over said railways for export passes either over the wharves of said Terminal Company to shipside or over the wharves of the Galveston Wharf Company hereinafter referred to. Likewise traffic imported into Galveston for movement out of Galveston passes over the wharves of either the Terminal Company or Galveston Wharf Company, according to whether the ship is berthed at one or the other.

IX.

The only track facilities for movement of cars to or from the ships of the Southern Pacific Company, when in their usual berths at the Southern Pacific Terminal Company, from or to the tracks of the Galveston, Harrisburg & San Antonio Railway Company, are

those owned by the Southern Pacific Terminal Company. The tracks of the Southern Pacific Terminal Company are entirely on its own lands and are used in moving cars to and from shipside. Any railway placing cars on these tracks pays the trackage charge referred to in next paragraph. In exceptional instances ships of the Southern Pacific Company berth at the wharves of the Galveston Wharf Company, in which instance freight is handled by and over the tracks of the Galveston Wharf Company.

X.

Besides the Galveston, Harrisburg & San Antonio Railway Company there are several other railways entering Galveston in which the Southern Pacific Company owns no stock and has no interest, but the Galveston, Harrisburg & San Antonio Railway Company is the only railway entering Galveston having physical con-
166 nection with the tracks of the Terminal Company. It does have such connection by two tracks connecting with the tracks of the Terminal Company at the southwest corner of their property. When cars are switched from the tracks of the Galveston, Harrisburg & San Antonio Railway Company onto the tracks of the Terminal Company they are switched by that railway. If they come from the tracks of any other railway upon the tracks of the Terminal Company they are also switched by the Galveston, Harrisburg & San Antonio Railway, for which said railway receives from the railway from whose tracks the cars are switched the sum of $1.75 per car. The Terminal Company receives from the Galveston, Harrisburg & San Antonio Railway and from any other railway having cars switched and placed upon the tracks of the Terminal Company a trackage charge of 50 cents per car.

The Southern Pacific Terminal Company owns no cars or locomotives and issues no bills of lading. It owns no stock in any railroad company or in any of the corporations above named in which the Southern Pacific Company owns stock. As above appears, over 99 per cent of its stock is owned by the Southern Pacific Company and the remainder, being about $400 worth, is held by individuals in their own right. The Railroad Commission of Texas has never exercised any jurisdiction over the Terminal Company or its operations.

The Terminal Company carries on a wharfage business, and publishes a schedule of charges for such business, which schedule, however, is not filed with the Interstate Commerce Commission. This schedule provides for 20 cents per ton on cotton seed meal and cake passing over the docks of the Terminal Company, and is
167 shown as a wharfage charge in the tariffs of the Galveston, Harrisburg & San Antonio Railway Company and all other railways entering the City of Galveston. Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young as hereinafter shown, but as a fact the wharfage charge is not imposed by the Terminal Company on the cotton seed meal and cake handled over the dock of E. H. Young other than as the same may be included in the general lease or contract price fixed as hereinafter indicated.

The circular attached, made part hereof, and marked Exhibit 1, was filed with the Interstate Commerce Commission. The Terminal Company appears in similar way as party to a circular issued April 15, 1907. C. K. Dunlap, who signed the circular, stated that he signed as General Freight Agent of the Galveston, Harrisburg & San Antonio Railway, Houston & Texas Central Railroad (and others named) and that the term "Sunset Route" was principally for advertising purposes. In the Joint Circular effective May 24, 1907, I. C. C. No. 645, issued by the Galveston, Harrisburg & San Antonio Railway Company the Terminal Company does not appear as a party. The circular of May 24, 1907, shows "terminal charges (other than storage and switching) at the Port of Galveston, Texas, applying on both domestic and foreign traffic." In this circular as in all prior ones appears the charge of 1 cent per 100 pounds on cotton seed cake and meal. At the time of the making of the order of the Interstate Commerce Commission herein referred to the tariffs of the railroad companies reaching Galveston showed a terminal charge of 1 cent per 100 pounds upon cotton seed cake and meal.

168 XI.

On the 9th day of December, 1836, the present State of Texas was an independent government, to wit: the Republic of Texas. On that date the Congress of that Republic in consideration of $50,000 paid and to be paid, enacted a law by which it granted to Michael B. Menard, his heirs and assigns, a league and labor of land on the east end of Galveston Island in Galveston county and authorized the President of the Republic of Texas to execute to him a conveyance; thereafter the full consideration having been paid by said Menard an instrument of conveyance was duly made, executed and delivered to said Menard, his heirs and assigns on January 5, 1838, by the Republic of Texas. Said instrument of conveyance is as follows:

In the Name of the Republic of Texas.

To all whom these presents shall come:

Know Ye, That I Sam Houston, President of the Republic of Texas, by the authority in me vested, in consideration of the sum of Fifty Thousand Dollars, and in pursuance of an Act of Congress passed on the 9th day of December, A. D. 1838, and by virtue of the authority thereby in me reposed, have granted and confirmed and by these presents do grant and confirm unto Michael B. Menard, his heirs and assigns, by deed of quit claim, all that tract of land, lying & being & situate on the East end of Galveston Island and bounded as follows, viz: Beginning at the North East corner of Lot No. Ten (10) in Section No. One (1) as represented in the plat of survey of the Island of Galveston made by A. C. Trimble and William Lindsey, under direction of the Secretary of the Treasury, and running thence due North one hundred and fifty varas to a stake, thence Eastwardly with the Channel of the Harbor in the Bay of Galveston and with the General course of said Island at the distance of at least

one hundred and fifty varas from the shore to a stake one hundred and fifty varas from the extreme Eastern point of said Island,
169 Thence South to the Gulf of Mexico, thence with the meander of the Gulf to the South East Corner of Not. No. One (1) in said plat of survey, thence Northwardly across the Island with the Eastern boundary of Lots Nos. One, two, three, four, five, six, seven, eight, nine and ten to the beginning, except the reservations, expressed in the fifth section of the act of Congress aforesaid.

To Have and to Hold the said tract of land with all the appurtenances thereunto belonging to the said Michael B. Menard, his heirs and assigns, for his and their own proper use and behoof, forever.

In Witness whereof I have caused this Patent to be issued under the seal of the Republic, and the Commissioner of the General Land Office to countersign the same and affix his Private seal (their being yet no public seal provided) hereto. Given under my hand in the City of Houston, on the twenty-fifth day of January, in the year of our Lord One thousand eight hundred and thirty eight, and of the Independence of Texas the Second.

[L. S.] SAM HOUSTON.

JOHN F. BORDEN, [L.S.]
Commr. Gen. Ld. Office.

"South" written over "North" being "South in Patent."
O. FARISH, *Clk.*

Filed 17 May '42 at 8 A. M. Recorded same day at 3 P. M. O. Farish, C. C. G. C.

On January 1, 1842, said Menard conveyed by an instrument in writing to the Galveston City Company, a corporation under the laws of the Republic of Texas, with power to own, hold, and convey lands, which powers continued under the State of Texas, certain lands, which instrument of conveyance is as follows:

REPUBLIC OF TEXAS,
County of Galveston:

Know all Men by these presents, that I Michael Brandamour Menard of the Republic & County aforesaid in consideration of value received to me paid by the President and Directors of the Galveston City Company, have granted, bargained, sold, released and confirmed, and by these presents do grant, bargain, sell, release, and confirm unto the said President, Directors and Stockholders in
170 the Galveston City Company all that certain tract or parcel of land lying, situate & being on the East end of Galveston Island in the County and Republic aforesaid comprising one league and one labor of land together with all and singular the rights, members, hereditaments and appurtenances to the same belonging, or in anywise incident or appertaining, being one league and labor of land granted to John N. Seguin, by the Government of the State of Coahuila & Texas on the 27th of April 1833, by virtue of authority

vested in the Governor, under decree of the Congress of said State No. 128 dated 7th April 1830 and in Article 12 of said decree. Title issued by the Alcalde on the 30th July, 1834. In virtue of which title I hold the said league and labor of land, and also in virtue of a patent issued to me on the twenty fifth day of January one thousand eight hundred & thirty eight by the President and Commissioner of the General Land Office of the Republic aforesaid in pursuance of an act of Congress passed on the ninth day of December one thousand eight hundred and thirty six.

To Have and To Hold all and singular the premises above mentioned unto the said President, Directors & Stockholders and their successors forever. And I do hereby bind myself my heirs executors and administrators to warrant and forever defend all and singular the said premises unto the said President, Directors and Stockholders and their successors against every person or persons whomsoever lawfully claiming or to claim the same or any part thereof by through or under me.

In witness whereof I have hereunto set my hand and seal in the City of Galveston this first day of January One thousand eight hundred and forty two.

M. B. MENARD. [L. S.]

Signed, Sealed & delivered in the presence of.

—— ——.

This day M. B. Menard appeared before me and acknowledged the foregoing instrument to be his act and deed for the purposes therein set forth.

Given under my hand this 4 Jany 1842.

Teste: OSCAR FARISH, *C. C. G. C.*

Filed 4 January 1842 at 9 A. M. Recorded same day at 10 A. M. O. Farish, C. G. C.

171 The identical land covered by the grant to M. B. Menard, hereinbefore mentioned, had, prior to the Menard Grant, been duly and regularly granted by the State of Coahuila and Texas to Juan N. Seguin. Seguin by proper conveyance transferred his title to M. B. Menard who in turn conveyed this identical property to the Galveston City Company.

Thereafter and in June, 1843, said Menard made, executed and delivered a further conveyance in writing to said Galveston City Company and its assigns which instrument is as follows:

REPUBLIC OF TEXAS,
County of Galveston:

This indenture, made this first day of June, one thousand eight hundred and forty three, between Michael B. Menard of the first part and James Love, Levi Jones, Peter J. Menard, Samuel M. Williams and —— —— Directors of the Galveston City Company, of the second part, all of the County and Republic aforesaid.

Witnesseth: Whereas, the Congress of said Republic passed an act approved the fifth day of February one thousand eight hundred and forty one incorporating the stockholders in the Galveston City Company, giving the management of the affairs of said Company to five Directors, who have from time to time under the appointment and by authority of the said stockholders had the care and control of the entire interest and property embracing the League and Labor of Land upon which the City of Galveston is placed. And whereas the said Directors of the Galveston City Company as well as their predecessors since the year one thousand eight hundred and thirty eight have sold and conveyed to various persons lots and land in the City of Galveston, and part of the said League and Labor by authority aforesaid and in virtue of a Deed of Conveyance to them made by the Trustees appointed by the party of the first part and holding the said Lands by Deed of Trust to the said Trustees, made for the use and benefit of said Company and whereas under and by authority of the aforesaid act of incorporation the said James Love, Levi Jones, Peter J. Menard, Samuel M.
172 Williams and —— —— are by the election of the stockholders of the Galveston City Company at present Directors of said Company. Now therefore to avoid the necessity of a recital of and reference to the various acts titles, deeds of Trust and conveyances by which the said League and Labor are now vested in the said Directors, and by which it has been the intention of the party of the first part should be fully and effectually done by the above mentioned deeds and conveyances; he the said party of the first part in consideration of the premises and the further consideration of one dollar to him in hand paid by the party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold & conveyed, and by these presents doth grant, bargain, sell and convey unto the said James Love, Levi Jones, Peter J. Menard and Samuel M. Williams, and Directors, of the Galveston City Company, and their successors in office all that certain tract or parcel of land situate, lying & being on the East End of Galveston Island & in the county and Republic aforesaid and comprehended within the following limits—Beginning at the North East Corner of Lot Number Ten (10) in Section No. One (1) as represented in the plat of survey of the Island of Galveston made by B. C. Trimble and William Lindsey, under the direction of the Secretary of the Treasury, and running thence due North one hundred and fifty varas to a stake, thence Eastwardly with the Channel of the harbour in the Bay of Galveston and with the general course of said Island at the distance of at least one hundred and fifty varas from the Bay shore to the extreme Eastern point of said Island, Thence south to the Gulf of Mexico: thence with the meanders of the Gulf, to the south east corner of Lot No. One (1) in said plat of survey. Thence Northwardly across the Island with the Eastern boundary of Lots Nos. One, two, three, four, five, six, seven, eight, nine & ten, to the beginning, except the reservations expressed in the fifth section of the act of Congress aforesaid. Comprehending within the afore-

said limits One League and Labor of Land, more or less, which the said party of the first part held by virtue of a title patent to him issued, in conformity to an act of Congress, by Sam Houston, President of said Republic and John J. Borden Commissioner, of
173 the General Land Office on the twenty fifth day of January one thousand eight hundred and thirty eight.

To have and to hold the above described tract or parcel of land, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining unto the said Directors of the Galveston City Company and their successors in office forever, and the said Michael Menard the party of the first part hereby covenants to and with the said Directors, To Warrant & forever defend the above described Tract or parcel of land to them and their successors in office against all persons whatever claiming or to claim the same or any part thereof, by, through or under him.

In witness whereof the said party of the first part has hereunto set his hand & seal the day & year first above written.

The words "Bay shore to the" interlined in the twenty third line and valid,—inserted before signing.

M. B. MENARD. [L. S.]

Witnesses:
G. BORDEN, JR.,
JAS. H. COCKE.

This day M. B. Menard appeared before me and acknowledged the foregoing instrument to be his act and deed for the purposes therein set forth.

Given under my hand June 10th, 1843.

Teste: OSCAR FARISH, *C. C. G. C.*

Filed August 15, 1843 at 8 A. M.
Recorded " " " " 10 A. M. O. Farish, C. C. G. C.

Thereafter on the 25th day of January, 1899, the said Galveston City Company executed and delivered to Collis P. Huntington, an instrument of conveyance as follows:

THE STATE OF TEXAS,
County of Galveston:

$200.00 I. R. Stamps, Cancelled on Original. No. 2159.

Know all men by these Presents: That the Galveston City Company, a Corporation duly created and existing by and under the laws of Texas (being hereunto duly authorized by resolution of its Board of Directors), for and in consideration of Two Hundred Thousand Dollars ($200,000.00) to it paid and to be paid, as hereinafter stipulated, by Collis P. Huntington, and for the other
174 considerations hereinafter expressed, has granted, sold and conveyed, and by these presents does Grant, Sell and Convey unto the said Collis P. Huntington, of the City, County and State of New York, all those certain lands and lands under water situate

in or near the city of Galveston, in Galveston County, State of Texas, bounded and described as follows, Viz: Beginning at the Southwesterly corner of Block Seven Hundred and ten (710) as shown upon the map hereto attached, and identified by the initials of the President of the Galveston City Company; thence along the Westerly line of said Block Seven Hundred and ten (710) and the prolongation thereof in a straight line in a Northerly direction, Two Thousand Eight Hundred and Sixty (2,860) feet, more or less, to the six feet contour as shown upon said map; thence in an easterly direction along said Contour to the point thereon where it would be intersected by the prolongation of the Westerly Line of Block Seven Hundred (700) if continued in a Straight Line; thence in a Southerly direction along said prolongation thereof and the Westerly line of Block Seven Hundred (700) to the Southwesterly corner of Block Seven Hundred (700); thence in a Westerly direction along Avenue B in said City, Thirty Eight Hundred (3,800) feet, more or less, to the point or place of beginning, the same including all the Blocks Seven Hundred and One (701) to Seven Hundred and Ten (710) both inclusive, together with all the lands and lands under water, lying Northerly of said Avenue B between the Westerly line of said Block Seven Hundred (700) and the prolongation thereof above mentioned, And the Westerly line of said Block Seven Hundred and Ten (710) and the prolongation thereof above mentioned to the Southerly boundary line of the Six feet Contour above referred to, together with all rights, privileges and franchises to which the said Galveston City Company is or may be entitled in connection with or appurtenant to such lands, lands under water, and other properties, or to be exercised thereon or thereover: Also all right, title and interest of the said Galveston City Company in, to and in respect to said Avenue B, between the Westerly line of Block Seven Hundred (700) and the westerly line of Block Seven Hundred and Ten (710), and in, to
175 and in respect to the streets and avenues northerly from Avenue B, between such lines and between the prolongation lines above mentioned.

To have and to hold, the above described premises, together with all and singular, the rights and appurtenances thereto or in any wise belonging (subject to the terms and conditions hereinafter mentioned) unto the said Collis P. Huntington, his heirs and assigns forever; And said Galveston City Company, the grantor herein, does hereby bind itself and its successors to Warrant and forever defend all such lands and lands under water, situated Southerly of a line Northerly of the Blocks above mentioned, and running at a uniform distance of one hundred and fifty (150) varas Northerly from the shore of Galveston Bay, as existing January 25th, 1838, unto the said Collis P. Huntington, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof; but only conveys with special Warranty unto the said Collis P. Huntington, his heirs and assigns, the remainder of the lands and lands under water hereby conveyed,—such Warranties, however, General and Special, are

expressly subject to any rights heretofore acquired by the City of Galveston, in, to or in respect to the streets and Avenues above mentioned.

Of the consideration of Two Hundred Thousand Dollars ($200,000.00) hereinbefore mentioned, the said Collis P. Huntington has paid to the said Galveston City Company at its office in Galveston, Texas, the sum of Fifty Thousand Dollars (50,000.00) in Cash, the receipt of which is hereby acknowledged. The balance of One Hundred and Fifty Thousand Dollars ($150,000.00) shall be paid by the said Collis P. Huntington, to the said Galveston City Company at its office in Galveston, Texas, in three equal portions of Fifty Thousand Dollars ($50,000.00) each, on or before the expiration of One, two or three years, respectively, from the date of the delivery of this deed, with interest from such date at the rate of four per cent (4 per cent) per annum payable annually upon such deferred payments: And a Vendor's Lien is hereby expressly reserved and retained on the property hereby conveyed to secure all of said deferred payments.

This conveyance is made upon the further Express Covenant and condition as follows viz: When the City of Galveston shall have closed the streets and Avenues Northerly from said Avenue
176 B, and lying between the westerly line of Block Seven Hundred (700) and its said prolongation and the westerly line of Block Seven Hundred and Ten (710) and its said prolongation, and when through and by means of such acts of Congress, Acts of the Legislature of the State of Texas, and ordinances and Conveyances from the City of Galveston, if any, as may be requisite for the purpose (for securing which the said Huntington, his heirs or assigns, will without Cost or Expense to the said Galveston City Company, cooperate with said Company) the right has been secured to the said Collis P. Huntington, or his heirs or assigns, to construct piers, as he or they may from time to time determine, northerly from said Avenue B and from points between said westerly line of Block Seven Hundred (700) and said westerly line of Block Seven Hundred and Ten (710) to the Harbor line of 1897, and to dredge between and on the sides of such piers, and Northerly and Northeasterly therefrom, and from said Harbor line of 1897 so as to permit the securing of at least twenty-five (25) feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom, and so as to secure a connection by a continuous Channel twenty five (25) feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit Steamers of at least five hundred (500) feet in length and fifty (50) feet beam, and drawing at least twenty-five feet of water to conveniently go at mean low water from the waters of the Gulf of Mexico, to, and lie alongside said piers, then and in that event, the said Collis P. Huntington his heirs or assigns, will, within six months thereafter, commence the construction of terminal facilities upon the property hereinbefore referred to, for the use of what are commonly called The Southern Pacific Railroad and Steamship Systems, and will, within two years thereafter, expend

at least the sum of One Hundred and Fifty Thousand Dollars ($150,000.00) in the construction of such piers and such dredging, and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship systems, their successors or assigns; and upon the failure to expend within said period of two years thereafter the said sum of One Hundred and Fifty Thousand Dollars ($150,000.00) as aforesaid, the title to the property conveyed shall revert to the said
177 Galveston City Company, and said company shall be entitled to retain as forfeited to it as liquidated damages, the consideration for this conveyance, whether theretofore paid or still remaining to be paid therefor.

In Testimony Whereof, the said Galveston City Company, in accordance with its charter and By-Laws, and in pursuance of a Resolution of its Board of Directors, has caused these presents to be executed by its President, J. H. Hutchings and attested by its secretary, Eugene A. Hawkins, Jr., with its corporate seal this the 25th day of January A. D., 1899.

[SEAL.] GALVESTON CITY COMPANY,
By J. H. HUTCHINGS, *President.*

THE STATE OF TEXAS,
County of Galveston:

10 Cent I. R. Stamp Cancelled on Original.

Before me, Wm. B. Lockhart, a Notary Public in and for said State and County, on this day personally appeared J. H. Hutchings, in his capacity as President of the Galveston City Company, and Eugene A. Hawkins, Jr., in his capacity as Secretary of the said Galveston City Company, the said J. H. Hutchings and Eugene A. Hawkins, Jr., being each known to me to be the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated, and as the act and deed of the Galveston City Company.

Given under my hand and seal of Office this 25th day of January A. D. 1899.

[SEAL.] WM. B. LOCKHART,
Notary Public, Galveston County, Texas.

Thereafter, and on the 4th day of April, 1901, the Galveston City Company duly made, executed and delivered an instrument in writing as follows:

THE STATE OF TEXAS,
County of Galveston:

Know all Men by These Presents, That, Whereas, by a deed dated the 25th day of January, 1899, and recorded in the Records of deeds of Galveston County, Texas, Book 163, pages 559 to 566,

the Galveston City Company, a corporation created and ex-
178 isting by and under the laws of Texas, conveyed to Collis P. Huntington, of the City, County and State of New York, certain land and lands under water situated in or near the City of Galveston, in Galveston County, Texas, particularly described in said deed, and, Whereas, Fifty Thousand Dollars of the consideration for said conveyance was paid by the said Collis P. Huntington upon the delivery of said deed, and it was stipulated in and by said deed that the balance, amounting to One Hundred and Fifty Thousand Dollars, should be paid by the said Collis P. Huntington, to the said Galveston City Company, in three equal portions of Fifty Thousand Dollars each on or before the expiration of one, two and three years, respectively, from the date of the delivery of said deed, with interest from such date at the rate of four per cent. per annum, payable annually, and a vendor's lien was reserved and retained in and by said deed on the property thereby conveyed to secure said deferred payments; and,

Whereas, the first portion of instalment of such deferred payments, amounting to Fifty Thousand Dollars, and maturing one year from the date of the delivery of said deed, together with the first annual instalment of interest on all of said deferred payments, was, at the maturity thereof, duly paid by the said Collis P. Huntington as stipulated; and, Whereas, the said Collis P. Huntington has since died, and Arabella D. Huntington, Charles H. Tweed and Isaac E. Gates, the executrix and executors of the will and estate of said Collis P. Huntington, availing themselves of the option and right existing under the provisions of said deed to pay the same before the maturity thereof, have this day paid to said Galveston City Company the balance in full of the purchase price promised by said Collis P. Huntington for said property as stipulated in said deed, amounting to One Hundred Thousand Dollars, and also all interest thereon not previously paid, amounting to Four Thousand Dollars, and desire and are entitled to the release of the lien reserved in said deed to secure the consideration therefor, and,

Whereas, it was stipulated in and by said deed that under certain conditions therein specified the said Collis P. Huntington, his heirs or assigns, should within a period therein specified commence the
179 construction of terminal facilities upon the property thereby conveyed for the use of what are commonly called the "Southern Pacific Railroad and Steamship Systems," and should, within a further time therein specified, expend at least the sum of One Hundred and Fifty Thousand Dollars in the construction of piers and dredging, and in the construction of depots and other terminal facilities for what are commonly called the "Southern Pacific Railroad and Steamship Systems," their successors or assigns; and, Whereas, the said Collis P. Huntington, his heirs or assigns, did, within the time specified in said deed, commence the construction of such terminal facilities upon the property thereby conveyed, and also did, within the time specified in said deed, expend more than the sum of One Hundred and Fifty Thousand Dollars in the construction of piers and dredging and in the construction of depots and other

terminal facilities for what are commonly called the "Southern Pacific Railroad and Steamship Systems," their successors or assigns as stipulated and required in said deed; Now, therefore, in consideration of the premises and the payments of the sum of One Hundred and Four Thousand Dollars in cash by the said Arabella D. Huntington, Charles H. Tweed, and Isaac E. Gates, executrix and executors of the will and estate of Collis P. Huntington, the Galveston City Company hereby acknowledges the payment in full of the balance of the purchase price promised by Collis P. Huntington, for the property conveyed to him by the deed above mentioned (to which and to the said record thereof reference is hereby made for description of said property), and hereby releases the lien reserved and retained in and by said deed to secure the balance of the consideration therefor. And the Galveston City Company further hereby acknowledges that the said Collis P. Huntington, his heirs or assigns, did, within the time specified and required in and by said deed, commence the construction of terminal facilities upon the property thereby conveyed for the use of what are commonly called the "Southern Pacific Railroad and Steamship Systems," and also did within the time specified and required in and by said deed expend more than the sum of One Hundred and Fifty Thousand Dollars in the construction of piers and dredging and in construction of depots and other terminal facilities for what are commonly called the "Southern Pacific Railroad and Steamship Systems," their successors
180 or assigns, as stipulated and required in and by said deed.

In Testimony Whereof, the said Galveston City Company has caused these presents to be executed by its President and attested by its Secretary with its corporate seal this 4th day of April, A. D., 1901.

GALVESTON CITY COMPANY,
By J. H. HUTCHINGS, *President.*

Attest:

[SEAL.]

EUGENE A. HAWKINS, JR., *Secretary.*

Ten-cent I. R. Stamp cancelled on original.

THE STATE OF TEXAS,
County of Galveston:

Before me, Wm. B. Lockhart, a Notary Public in and for said State and County, on this day personally appeared J. H. Hutchings, in his capacity as President of the Galveston City Company, and Eugene A. Hawkins, Jr., in his capacity as Secretary of the said Galveston City Company, the said J. H. Hutchings, and Eugene A. Hawkins, Jr., being each known to me to be the persons whose names are subscribed to the foregoing instrument, and each acknowledged to me that he executed the same for the purposes and considerations therein expressed, and in the capacity therein stated, as the act and deed of the Galveston City Company.

Given under my hand and seal of office, this 20th day of April, A. D., 1901.

[SEAL.] WM. B. LOCKHART,
Notary Public in and for Galveston County, Texas.

Filed for Record April 20th, at 11:10 o'clock A. M.
Recorded April 30th, 1901, at 1:30 P. M.

On the 13th of August, 1900, Collis P. Huntington died in the State of New York, the State of his domicile. He left a will, duly probated in the State of New York, and also on the 3rd day of April, 1903, duly probated in the County of Galveston, in the State of Texas, and duly filed and recorded in accordance with the laws of the State of Texas, and duly effective under the laws of the State of Texas as to all property, rights, titles, estates, privileges, and franchises held by said Huntington, or in which he was in-
181 terested in the State of Texas. Under and by virtue of the terms of said will said property conveyed by the Galveston City Company to Collis P. Huntington, with all rights, titles and privileges thereto attaching, and all rights, privileges and franchises granted to said Huntington, his heirs or assigns, under the Act of Legislature or the ordinances of the City of Galveston, with power of disposition, passed to Arabella D. Huntington, J. T. Gates and Chas. H. Tweed, as executrix and executors of said will, with the remainder and further title in Henry E. Huntington as residuary legatee of said will. It is agreed that said will and its probate need not be filed herein.

Thereafter, on the 10th day of July, 1901, the executrix and executors of the will and estate of said Huntington, said Arabella D. Huntington and Henry E. Huntington, in their individual rights, made, executed and delivered a certain instrument of conveyance to the Southern Pacific Terminal Company, the corporation hereinbefore referred to, which instrument is as follows:

$498.45 I. R. Stamp cancelled on original.

Know all Men by these Presents: That, Whereas, the last will and Testament of Collis P. Huntington, deceased, was duly probated according to the laws of the State of Texas and of New York, where he resided at the time of his death, by an order and decree of the Surrogate's Court in and for the City and County of New York, in said State of New York, made on the 12th day of October, 1900, and, Whereas, a copy of said last Will and Testament and its probate attested by the Clerk of said Surrogate's Court and the seal of said court annexed, together with a certificate from the Honorable Abner C. Thomas, the Surrogate Judge and presiding magistrate of said court, that the attestation is in due form, was delivered to and was filed with the Clerk of the County Court in and for Galveston County, Texas, on the second day of July, 1901, to be
182 recorded in the Register of Deeds of said County in accordance with and as provided by the laws of the State of Texas,

and reference is hereby made thereto and to such record thereof for description of the terms and provisions thereof:

And whereas, in and by said Will and Testament and the order and decree probating the same as aforesaid, the undersigned Arabella D. Huntington, Charles H. Tweed and Isaac E. Gates were constituted and appointed as the executrix and executors of said will and estate, and duly qualified as such, as provided by the laws of said State of New York, on the 15th day of October, 1900, and letters testamentary were issued to them by the said Surrogate's court of the County of New York, and State of New York, on the 15th day of October, 1900, and they are now exercising the powers conferred upon them by the provisions of said Will and Testament as such executrix and executors, and Whereas, the undersigned Arabella D. Huntington and Henry Edwards Huntington, became and are the residuary legatees and devisees of the said Collis P. Huntington, deceased, as by said last will and testament, reference thereto being had, will fully appear. Now therefore, we, Arabella D. Huntington, Charles H. Tweed and Isaac E. Gates, of the City and State of New York, as executrix and executors of the Will and estate of Collis P. Huntington, deceased, and Arabella D. Huntington of the City and State of New York, and Henry Edwards Huntington, of the City of San Francisco and State of California, for and in consideration of one million dollars to us now paid by the Southern Pacific Terminal Company, a corporation created, organized and existing under and by virtue of the laws of the State of Texas, have granted, sold and conveyed, and by these presents do grant, sell and convey, but without any covenant or warranty, whether express or implied, unto the said Southern Pacific Terminal Company the following described lands, premises, grants, franchises and rights, to wit:

First. All those certain lands and lands under water situate in and near the City of Galveston, in Galveston County, Texas, bounded and described as follows, viz: Beginning at the southwesterly corner of the block of ground described and designated upon the maps of said city as block seven hundred and ten (710), thence along the
westerly line of said block seven hundred and ten (710) and
183 the prolongation thereof in a straight line in a northerly direction, two thousand eight hundred and sixty (2860) feet more or less, to the six feet contour as shown upon said map; thence in an easterly direction along said contour to the point thereon where it would be intersected by the prolongation of the westerly line of block seven hundred (700) if continued in a straight line; thence in a southerly direction along said prolongation thereof and the westerly line of block seven hunderd (700) to the southwesterly corner of said block seven hundred (700); thence in a westerly direction along Avenue B, in said city, thirty-eight hundred (3800) feet, more or less, to the point or place of beginning, the same including all the blocks seven hundred and one (701) to seven hundred and ten (710) both inclusive, together with all the lands and lands under water lying northerly of said Avenue B between the westerly line of said block seven hundred (700) and

the prolongation thereof above mentioned, and the westerly line of said block seven hundred and ten (710) and the prolongation thereof above mentioned to the southerly boundary line of the six feet contour above referred to, together with all the rights, privileges, and franchises to which the said Galveston City Company or the said Collis P. Huntington was heretofore entitled in connection with or appurtenant to such lands, lands under water and other properties, or to be exercised thereon or thereover; and also all the right, title and interest at any time heretofore held or owned by the Galveston City Company or by said Collis P. Huntington, in, to and in respect to, the streets and avenues northerly from said Avenue B, between the westerly line of said block seven hundred (700) and the westerly line of said block seven hundred and ten (710) and between the prolongation lines above mentioned; together with all improvements of or upon the said premises, and all and singular the rights and appurtenances thereto in anywise belonging, the same including all the property (except a portion of Avenue B conveyed by us on the eighth day of July, 1901, to The Galveston, Houston & Northern Railway Company) that was conveyed by the Galveston City Company to said Collis P. Huntington by deed dated the 25th day of January, A. D. 1899, and recorded in the Records of Deeds of Galveston County, Texas, Book 163, pages 559 and 566, to which deed and to said record thereof
184 reference is hereby made in aid of the description of the property hereby conveyed.

Second. All the estate, rights, privileges and franchises granted to said Collis P. Huntington, his heirs or assigns, by an ordinance of the said City of Galveston, entitled "An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the City of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shores of Galveston Bay within the corporate limits of the City of Galveston upon certain specified conditions," passed on the 4th day of February, 1899, together with the said ordinance and all and singular the estate, rights, privileges and franchises thereby granted or accruing or that may have been at any time heretofore acquired or held thereby or thereunder by the said Collis P. Huntington, his heirs or assigns, or that may now exist, or that may hereafter arise under and by virtue of said ordinance and the grants thereby made, but subject nevertheless to all the conditions in said ordinance specified.

Third. All the estate, rights, privileges and franchises granted or accruing to said Collis P. Huntington, his heirs or assigns by an act of the Legislature of the State of Texas, entitled "An Act ratifying and confirming an ordinance passed by the City Council of the City of Galveston on the 4th day of February, 1899, entitled 'An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the City of Galveston and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the City of Galveston, upon certain specified

conditions,' and conditionally relinquishing any claim the State of Texas may have to part of the property therein described," approved May 1st, 1899, together with said act and all and singular the rights, privileges and franchises thereby granted or accruing, or that may have been at any time heretofore acquired or held thereby or thereunder by the said Collis P. Huntington, his heirs or assigns, or that may now exist, or that may hereafter arise under and by virtue of said act and the grant thereby made, but subject, nevertheless, to all the conditions in said act specified.

185 Fourth. That certain ditch or drain described in a resolution entitled a "Resolution granting C. P. Huntington and associates permission to construct and maintain a drain — ditch across certain streets and avenues," adopted by the City Council of Galveston, Texas, on the third day of April, 1900, together with the said resolution and all the rights and privileges granted or accruing to the said Huntington thereby and thereunder, or that may now exist or may hereafter arise under and by virtue of the said resolution and the grants thereby made, and also the right of way for and all other rights and interest in, to or in respect of said ditch or drain that may have been at any time heretofore acquired or held by the said C. P. Huntington, his heirs or assigns.

To Have and to Hold the above described lands, premises, grants, franchises and rights, together with all and singular the rights and appurtenances thereto in anywise belonging unto the said Southern Pacific Terminal Company, its successors and assigns forever, but without any covenant or warranty whatsoever whether express or implied, on our part, or on the part of either of us. And we do, and each of us does, hereby covenant, grant and agree to and with the said Southern Pacific Terminal Company, its successors and assigns, that we, and each of us, shall and will at all times and from time to time hereafter, upon request, make, do, execute and deliver all such further and other acts, deed and things by way of further assurance as shall be reasonably advised, devised or required to effectuate the intention of these presents.

Witness our hands, this tenth day of July, A. D. 1901.

ARABELLA D. HUNTINGTON,
CHARLES H. TWEED,
I. E. GATES,
Executrix and Executors of the Will and Estate of Collis P. Huntington, Deceased.
ARABELLA D. HUNTINGTON,
H. E. HUNTINGTON.

THE STATE OF NEW YORK,
County of New York:

Before me, Wm. Shillaber, a Notary Public within and for the County and State of New York, on this day personally appeared Arabella D. Huntington, a feme sole, Charles H. Tweed and

186 Isaac E. Gates, known to me to be the persons whose names are subscribed to the foregoing instrument, executrix and

executors of the will and estate of Collis P. Huntington, deceased, and severally acknowledged to me that they executed the same for the purposes and consideration therein expressd, and in the capacity therein stated.

Given under my hand and seal of office, in City, County and State of New York, this tenth day of July, A. D. 1901.

[SEAL.] WILLIAM SHILLABER,
Notary Public, New York County, New York.

THE STATE OF NEW YORK,
County of New York:

Before me, Wm. Shillaber, a Notary Public within and for the County and State of New York, on this day personally appeared Arabella D. Huntington, a feme sole, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, in the City, County and State of New York, this tenth day of July, A. D. 1901.

[SEAL.] WILLIAM SHILLABER,
Notary Public, New York County, New York.

THE STATE OF NEW YORK,
County of New York:

Before me, Wm. Shillaber, a Notary Public within and for the county of New York, and State of New York, on this day personally appeared Henry Edwards Huntington, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this tenth day of July, A. D. 1901.

[SEAL.] WILLIAM SHILLABER,
Notary Public, New York County, New York.

THE STATE OF NEW YORK,
County of New York ss:

I, William Sohmer, Clerk of the County of New York,
187 and also Clerk of the Supreme Court for the said County the same being a Court of Record, do hereby certify that William Shillaber, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the said County, commissioned and sworn, and duly authorized to take the same; And further that I am well acquainted with the handwriting of such Notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, the 11 day of July, 1901.

[SEAL.] WM. SOHMER, *Clerk.*

Filed for Record July 24th, 1901, at 9:30 o'clock A. M.
Recorded July 26th, 1901, at 3:30 o'clock P. M.

On February 4, 1899, the City of Galveston, a municipal corporation duly and legally incorporated under the laws of the Republic of Texas as a city, and so continued under the State of Texas, duly enacted a certain ordinance. On May 1, 1899, the Legislature of the State of Texas duly passed an act, which act sets forth the ordinance of the City of Galveston hereinabove referred to, and is as follows:

Chapter XCIV, Acts Twenty-Sixth Legislature of Texas, Page 162.

S. B. No. 228.

An act ratifying and confirming an ordinance passed by the city Council of the City of Galveston on the 4th day of February, 1899, entitled "An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the City of Galveston, and authorizing and empowering Collis P. Huntington, his heirs and assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the City of Galveston upon certain specified conditions," and conditionally relinquish-
188 ing any claim the State of Texas may have to part of the property therein described.

Whereas, the city council of the city of Galveston, on the fourth day of February, 1899, passed an ordinance reading as follows:

An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the city of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shores of Galveston Bay within the corporate limits of the city of Galveston upon certain specified conditions.

Whereas, Collis P. Huntington has contracted for the purchase of the property hereinafter more particularly referred to, subject to the approval of the title by counsel, and

Whereas, one of the conditions of such purchase is that when the city of Galveston shall have closed the streets, avenues and alleys, if any, northerly from Avenue B, in the city of Galveston, and lying between the westerly line of block 700 and its prolongation in a northerly direction, and the westerly line of block 710 and its prolongation in a northerly direction and when through and by means of such acts of Congress, acts of the Legislature of the State of Texas, and ordinances and conveyances from the city of Galveston, if any, as may be requisite for the purpose, the right has been secured to the said C. P. Huntington, or his heirs or assigns, to construct piers

as he or they may from time to time determine, northerly from said Avenue B, and from points between said westerly line of block 700 and said westerly line of block 710, to the harbor line of 1897, and to dredge between and on the sides of such piers and northerly and northeasterly therefrom and from said harbor line of 1897, so as to permit the securing of at least twenty-five feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom, and so as to secure a connection by a continuous channel twenty-five feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least five hundred feet in length and fifty feet beam, and drawing at least twenty-five
189 feet of water, to conveniently go at mean low water from the waters of the Gulf of Mexico to and lie alongside said piers, then and in that event the said C. P. Huntington, his heirs or assigns, will within six months thereafter commence the construction of terminal facilities upon said property for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, and will, within two years thereafter, expend at least the sum of one hundred and fifty thousand dollars ($150,000.00) in the construction of such piers and such dredging, and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns; and,

Whereas, no streets, avenues or alleys have ever been heretofore opened, constructed or utilized on or through the said property above referred to, and hereinafter more particularly described, and no streets, avenues or alleys have ever been heretofore laid out or designated or recognized by the city of Galveston, or the owners of property northerly of the north line of said blocks from 700 to 710, inclusive, but the said property, or the greater part thereof, is and has ever been under the waters of Galveston Bay; and

Whereas, it is greatly to the interest of the city of Galveston and its inhabitants that the work and improvements contemplated by said C. P. Huntington and his assigns should be performed, and it is necessary to said work and improvements and to the proper utility of said property for such purposes, that there should be no streets, avenues or alleys opened through and across said property;

Now, therefore, be it ordained by the city council of the city of Galveston, as follows:

SECTION 1. That any or all streets, avenues, or alleys, if any, heretofore opened, laid out, or in any manner designated upon, through or across the following described property in the city of Galveston, to wit:

Beginning at the southwesterly corner of block 710, thence along the westerly line of block 710 and the prolongation thereof in a straight line in a northerly direction 2860 feet, more or less, to the six feet contour in Galveston Bay; thence in an easterly direc-
190 tion along said contour to a point thereon where it would be intersected by the prolongation of the westerly line of block 700, if continued in a straight line; thence in a southerly direction

along said prolongation thereof and the westerly line of block 700 to the southwesterly corner of said block 700; thence in a westerly direction along Avenue B, 3800 feet, more or less, to the place of beginning; the same including all of blocks 701 to 710, both inclusive, together with the lands and lands under water lying northerly of said Avenue B, between the westerly line of said block 700 and the prolongation thereof above mentioned, and the westerly line of said block 710 and the prolongation thereof above mentioned to the southerly boundary line of the six feet contour above referred to; and also upon, through or across the lands under water and property lying between the property above described and the harbor line of 1897, or the harbor line as it may be changed from time to time, be and the same are each and all hereby perpetually abandoned, discontinued and closed.

SECTION 2. That said Collis P. Huntington, his heirs or assigns, be and they are hereby authorized, empowered and granted the right perpetually to construct and maintain piers as he or they may from time to time determine upon the property described by metes and bounds in the preceding section hereof, and upon the property lying and situated between the same and the harbor line of 1897, and to dredge between and on the sides of such piers and northerly and northeasterly therefrom and from said harbor line of 1897, so as to permit the securing of at least twenty-five feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom, and so as to secure a connection by a continuous channel twenty-five feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least five hundred feet in length and fifty feet beam, and drawing at least twenty-five feet of water, to conveniently go at mean low water from the waters of the Gulf of Mexico to and lie alongside of said piers, and to maintain the same; and to construct and maintain upon said property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns.

191 SECTION 3. The grant hereby made and all of the rights and privileges hereby conferred are subject to and upon the following conditions, viz:

First. That the said C. P. Huntington, his heirs or assigns, shall, within six months from the ratification and approval of this ordinance and the confirmation of the grant made and the rights conferred by it and by the Legislature of the State of Texas, and the passage of such acts of Congress, if any, as may be requisite for the purpose, commence the construction of terminal facilities upon the property hereinbefore referred to for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, and shall, within two years thereafter, expend at least the sum of one hundred and fifty thousand dollars ($150,000.00) in the construction of such piers and such dredging, and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns.

Second. That if the said C. P. Huntington, his heirs or assigns, shall charge wharfage for the use of such piers or other facilities upon said property, except in so far as the wharf-service may be covered by the freight rate, all such wharfage shall be subject to the regulations of the Railroad Commission of Texas; but this shall not be so construed as to permit or allow any other person or corporation to use said property, or any portion thereof, without the consent of said C. P. Huntington, his heirs or assigns, owning the same at the time.

And whereas, it is greatly to the interest of the public, that the property described in Section 1 of said ordinance should be developed for shipping and transportation purposes, and that the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and State, and to utilize, as far as practicable, the deep water at said port secured by the expenditure of large sums of money by the government of the United States.

Now, therefore,

Be it enacted by the Legislature of the State of Texas,

SEC. 1. That the ordinance passed by the city council of
192 Galveston on the fourth day of February, 1899, entitled "An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the city of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the city of Galveston, upon certain specified conditions," be and the same is hereby in all things authorized, ratified, approved and confirmed, except in so far as the provisions of said ordinance may be in conflict with the provisions of this act, and the State of Texas hereby relinquishes unto the said Collis P. Huntington, his heirs or assigns, whatever title or claim, if any, it may have in or to any portion of the flats or lands under water described in Section 1 of said ordinance, subject, however, to each and all the conditions set forth or contained in section three of said ordinance as above recited, and all other conditions contained in any part of this act, and upon the further condition, that if the said C. P. Huntington, his heirs or assigns, shall charge wharfage for the use of such piers or other facilities upon said property, all such wharfage charges shall be subject to the regulation of the Railroad Commission of Texas; and thereupon the said C. P. Huntington, his heirs, assigns or successors, shall make an annual report to the said Railroad Commission of Texas, in such manner and on such forms and under such rules and regulations and at such time as the Railroad Commission may prescribe; but this shall not be so construed as to permit or allow any other person or corporation to use said property or any portion thereof, without the consent of said C. P. Huntington, his heirs or assigns, owning the same at the time, and upon the breach or violation of said conditions, or either of them, all the rights and powers hereby granted shall be revoked and shall revert to the State of Texas, and this act shall thereupon become and be null and void; provided further, that the system of railroad tracks that may be constructed by Collis P. Huntington,

his heirs or assigns, on the property described and referred to in Section 1 of the above recited ordinance, shall connect with the track of any railroad company that may be built to the intersection of Forty-first street with the prolongation of Avenue A according to the map of the Galveston City Company; provided, that this shall not be construed as authorizing any person or corpora-
193 tion to use the tracks that may be constructed by the said Huntington, his heirs or assigns, on said property.

SEC. 2. The said Collis P. Huntington, his heirs or assigns, or the person, company, or corporation owning or controlling the above described property and all the improvements thereon situated, shall never consolidate said property or the stock or franchise of such corporation as may own or control the same with the stock or property of the Galveston Wharf Company, or any company or corporation succeeding to the rights of the said Galveston Wharf Company, nor shall the owner of said property enter into any agreement with the Galveston Wharf Company, its successors or assigns, or any other Wharf Company which may now exist or which may be hereafter organized, by which the wharf or other terminal charges shall be regulated or fixed, and this inhibition upon the said Collis P. Huntington, his heirs or assigns, or the person, company or corporation owning or controlling the above described property and all improvements thereon situated shall also apply to the property now owned by the Gulf, Colorado & Santa Fe Railway Company between Fourth and Tenth streets, as shown by the Galveston City Company's map of the said city of Galveston. Nor shall any person owning or holding any interest in the form of stock or otherwise, in the property hereinbefore described, own or hold any interest, in the form of stock or otherwise in the wharf or bay frontage between Fourth and Forty-first streets, as now shown by the Galveston City Company's map of the said city of Galveston, and all sales, conveyances and transfers of whatsoever character in violation of this section shall be null and void; the object of this section being to keep the control, ownership or management, direct or indirect, of the property hereinbefore described, and the control, ownership or management of the wharf or bay frontage between the said Fourth and Forty-first streets entirely distinct and independent of each other. And no charter formed for the use, operation and management of the property hereinbefore described, shall be granted unto the said Collis P. Huntington, or his assigns, unless this section be incorporated therein and all certificates of stock that may be issued by the company formed for the use, operation or management of the property hereinbefore described shall also contain this section on the back thereof.

194 SEC. 3. That the near approach of the close of this session and the large amount of business remaining to be disposed of before the final adjournment, and the public benefit to be derived from the improvements contemplated by this act, create an imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days in each house, and a case of emergency that this act should take effect and be in

force from its passage, and such rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted.

(NOTE.—The enrolled bill shows that the foregoing act passed the Senate by vote, yeas 19, nays 3; and was reported to the House of Representatives where it was amended and passed, vote not given; Senate concurred in House amendments, vote not given.)

Approved May 1, 1899.

Said Huntington, his heirs and assigns, duly paid and performed the considerations and performed and fulfilled within the time prescribed the covenants, conditions and provisions of all the before named deeds, conveyances, ordinances and act.

Hereto attached is a map marked Exhibit A, which map shows the property of the Southern Pacific Terminal Company, the Galveston Wharf Company and of the various railroad companies in the city of Galveston as indicated by the legend "Color Scheme."

The above described land conveyed to said C. P. Huntington is situated entirely on said Menard Grant and the docks, piers, slips and other property of the Terminal Company in this statement referred to are situated on said Menard Grant and the portion thereof so conveyed to said C. P. Huntington.

The City of Galveston is entirely situated on the Menard Grant.

The Galveston, Harrisburg & San Antonio Railway Com-
195 pany has in the City of Galveston depot and station facilities apart from the Terminal Company ample for the handling of all its traffic, including export and import traffic, except that as to export and import traffic it has no means of reaching ship-side except over the tracks of the Terminal Company and the Galveston Wharf Company, as herein stated.

Exhibit "A" hereto shows blocks, avenues, streets, and alleys north of Avenue "E" and south of the property of the Galveston Wharf Company and of the property of the Terminal Company lying west of 37th Street and east of the east line of 51st Street. Such blocks, avenues, streets and alleys appear on the map of Galveston, but north of said Avenue "E" and south of the property of the Wharf Company and between 37th Street and 51st Street have never in any way been laid out on the ground or used by the general public, but all of said property included in said limits has been used for more than five years last past by railroads for yards and trackage. All persons who have business with the Terminal Company or any industry located on its property are allowed access either on foot or by wagon by the Terminal Company. Now and for a number of years there has been built a fence along Avenue "E" westward from about 37th Street to the east line of 51st Street cutting off all that said land north of Avenue "E" so that the same cannot be reached from any point on the south thereof except by going to the east of 37th Street.

XII.

The property betwen Tenth Street and Forty-first Street and north of Avenue "A" except blocks 730 to 739 inclusive is the prop-

erty of the Galveston Wharf Company. The water frontage
196 of said company is laid out in piers actually constructed, except the property between pier 39 and the west boundary line of the Galveston Wharf Company, which is not yet laid out and built into piers, but is for the building of piers in the future. On pier 14 is erected a large elevator, styled "Elevator A." It is a permanent structure. North of block 736 on the property of said Galveston Wharf Company is a coal yard which has been occupied as such for several years. Between piers 15 and 16 is a slip at the south end of which is constructed Marine Ways for the hauling out, cleaning and repairing of any ships desiring its use and which is a permanent structure. North of block 738 on the property of said company there is constructed a building and ferry used and occupied by the Gulf & Interstate Railway. On pier 20 of the Galveston Wharf Company is a house occupied and controlled by W. J. Chapman, engaged in the fish and oyster business. The west end of pier 22 is covered by a shed occupied and used by the Galveston Fisheries Company engaged in the handling of fish, and said company has a permanent structure, and an overhead elevator extending from this to its ice house on the northeast corner of block 681. Piers 23 to 26, inclusive, are occupied by a large warehouse that for many years has been used and occupied by what is known as the Mallory Line for the storage and handling of freight. North of Block 748 is constructed an elevator designated "Elevator B." It is an elevator for the storing and handling of grain, and from this elevator is an overhead elevator to the outer edge of pier 28, which

elevator is a permanent structure. A compress known as
197 the Moody Compress occupies the portion of the Galveston Wharf Company immediately south of piers 29 to 33. The structure is permanent and used by the Moody Compress Company, a corporation engaged in the storing, handling, compressing and shipping cotton. South and west of the Moody Compress are the material yard and permanent tanks of the Creosote Works, a corporation engaged in treating timber and the storage and handling of creosote, all of which are permanent improvements and used and occupied by the Creosote Works. North of the Creosote Works and on the slip between piers 33 and 35 is a coal elevator, which now is and for many years has been occupied by Fowler & McVittie for the handling and storage of coal. All of said improvements herein mentioned are situated on the property of the Galveston Wharf Company, along, by and on piers used by it for storage, handling and shipping of freight from the city of Galveston into the interior of Texas, having come to Galveston from various ports in this and foreign countries, and also used for the shipping of out-bound freight which passes over said piers to said ports. All of the improvements above named are permanent, and occupy the positions where they are situated, and there is a fixed rental paid for them by their owners to the Galveston Wharf Company. One of these elevators, viz., the Santa Fe elevator, is engaged in the purchase, storage, handling and shipping of grain for others. It pays

a fixed rental to the Galveston Wharf Company and pays no wharfage beyond this.

At the time of the hearing before the Commission there was under construction what is now known as Pier 38 of the Galveston Wharf Company. Thereafter, in pursuance of the contract made
198 between the New Orleans Export Company, a corporation, and the Galveston Wharf Company, there was erected by the Export Company, at its own expense and for its own use on said Pier 38, a plant for the grinding, sacking and shipping of meal and cake. The Export Company pays a fixed annual rental and in addition pays whatever wharfage charges are applied by the Galveston Wharf Company to such shipments over its wharf, and said plant has continued to be after its completion and now is used and operated by the New Orleans Export Company.

With the single exception of the Santa Fe Elevator Company all commodities passing over the wharves of the Galveston Wharf Company whether owned or handled by industries located upon the Galveston Wharf Company or off thereof pay the regular tariff wharfage charge to the Galveston Wharf Company.

It is claimed by the Galveston Wharf Company that its policy is, not to give exclusive privileges on its wharves to any industry, and that none of its contracts provide for such privileges.

West of the property of the Southern Terminal Company and east of the land owned by the Galveston Wharf Company the land fronting on the channel is owned by other railroad corporations and individuals and can be by dredging and filling made available for shipping and wharf purposes. An appropriation for work of this sort is now available when needs of commerce require its use. Aside from the land of the Southern Pacific Terminal Company and the Galveston Wharf Company the frontage on the channel is approximately one mile.

199 XIII.

The Galveston Wharf Company is a corporation duly organized and existing under the laws of the State of Texas and has been in existence since the year 1854 and for many years prior to the organization of the Terminal Company and the building of the docks of that company, furnished the only wharfage facilities of the city of Galveston. Prior to such time various lot owners in the City of Galveston erected wharves on their property and carried on a general wharfage business. Said Wharf Company owns locomotives and railroad tracks on its wharves which connect with the railroad tracks of all railroad companies in the city of Galveston. The Galveston Wharf Company handles all freight destined to pass to or over its wharves from or to any line of railroad for which it receives a switching charge of $1.75 per car and also a wharfage charge of 1 cent per 100 pounds on cotton seed cake and meal. The Galveston Wharf Company and the Southern Pacific Terminal Company furnish the only wharf facilities at the port of Galveston. The Texas Railroad Commission exercises regulative supervision over the Galveston Wharf Company in the switching service which it performs.

XIV.

The Terminal Company has on its property two piers, known as Pier "A" and Pier "B." Pier "A" at its greatest width is approximately 230 feet. It is wedge shaped, uncovered and approximately 1,400 feet long. Pier "B" is about 645 feet in width and 1,400 feet long. On these piers the Terminal Company has erected all facilities necessary for handling import and export freight
200 and all freight which may come to said Terminal Company or passing over its wharves. If said piers should become insufficient for handling said freight, the Terminal Company has abundant land under water on the grant from the legatees and executors of Collis P. Huntington to erect additional piers and afford further facilities, which would be done if found necessary. On Piers "A" and "B" railway tracks have been laid by the Terminal Company which are used as a facility for transferring freight from the railroad to the ship, or from the ship to the railroad. All freight passing over said piers from any ships to the City of Galveston, or to any railroads and destined to points other than the City of Galveston, pays the Terminal Company a fixed wharfage charge. Freight destined to domestic or foreign ports passing over said piers from the City of Galveston, or from other points and handled into the City of Galveston by the railroads, pays the Terminal Company a fixed wharfage charge. The facilities furnished by Piers "A" and "B" for handling freight originating in the City of Galveston, or destined to it, as well as that handled between the ships and the Galveston, Harrisburg & San Antonio Railway and its connections are adequate. If the property of the Galveston Wharf Company were destroyed the piers "A" and "B" of the Terminal Company would be inadequate for handling the business passing by import and export and coast-wise through the City of Galveston. Ships to and from foreign ports and coast-wise ships other than those of the Southern Pacific Company berth at Piers A and B and there receive and deliver freight, and at these piers the Terminal Co. carries on its general wharfage business.

XV.

201 In the building of Pier "B" it was necessary to dredge a slip west of it where ships could berth. Such slip was built 300 feet in width and 1,400 feet in length and excavated to such depth that it would carry a ship drawing twenty-five feet of water, and is known as slip "B." On the west side of said slip, in order that the soil, through the action of storm and wave, might not drift into the slip and fill it, the Terminal Company erected a bulkhead 1400 feet in length. Westward of said bulkhead about the year 1901 the lands of the Terminal Company were lying idle, useless, and not needed by them. About this time, certain contractors doing jetty work in Galveston Bay obtained permission from the Terminal Company to erect a trestle west of the bulkhead and place upon it a railway track in order to handle cars to the end of the trestle near the north end of

the bulkhead. The jetty contractors at their own expense built said track and paid to the Terminal Company fifty cents per car for the service over the track. In the year 1905 the jetty contractors were upon the point of finishing their work when E. H. Young approached the traffic manager of the Galveston, Harrisburg & San Antonio Railway and told the latter he would like to obtain the bulkhead and space west of it for the use of him, the said Young, in grinding, sacking and exporting cotton seed meal and cake. The traffic manager said to him that the contractors were nearly through and that he presumed that later there would be no trouble in perfecting an arrangement. Later the contractors did complete their work and left the trestle and track more or less in a state of disrepair. It was of no service to the Terminal Company, and
202 the Terminal Company derived no revenue from it nor for the land on which it was situated and the lands lying west of it, but they were a source of expense, in that they had to pay taxes on them; and after the abandonment of them, Young entered into the contract with the Terminal Company herein shown. In pursuance to the provisions of the contract herein set forth the Terminal Company proceeded to construct a dock or a pier known as Pier C for the use of said Young, and to erect thereon a warehouse, shed and platform for the use of said Young. The original construction and the subsequent enlargement thereof cost the Terminal Company about $65,000. Under the amendments to the original contract made with Young the pier was increased until at this time it is 300 feet wide at its widest part and about 1400 feet in length.

XVI.

After the said preliminary negotiations had been successfully completed a formal contract was on June 26, 1905, made between said E. H. Young and the Southern Pacific Terminal Company for a period of five years at an annual rental of $5,000 to be paid to said Terminal Company by said Young. A supplemental agreement was made for additional space January 9, 1906. Said agreements were merged into an agreement of the date of November 1, 1906, which agreement is correctly set forth in the Report of the Commission attached as Exhibit A to the Answer of the Interstate Commerce Commission at pages 255 to 258, inclusive.

The original and supplemental agreements, except as to the size of Pier C and amount of rent to be paid, were substantially the same as the agreement of Nov. 1, 1906, and therefore need not be further shown.

203 Said Young at no time prior to the making of the last contract between him and the Terminal Company had any information as to the ownership of stock in said Terminal Company or Railway Company. He did know that the officials with whom he conferred were officers of both the Railway Company and the Terminal Company.

XVII.

E. H. Young is an exporter of cotton seed cake and meal from the Port of Galveston. The business of E. H. Young is that of a merchant and manufacturer engaged in buying, selling and converting cake and meal for his own account. Under his contract with the Terminal Company he took possession of Pier C, which is a covered pier, and the improvements erected thereon by the Terminal Co., and has continued to hold and control the same under said contract, paying to said Terminal Co. the price stipulated in said contract, and has placed thereon cake-sacking and grinding machines representing an investment of more than $50,000. Carloads of cake are switched in on the west side of the dock and the cake is unloaded, sacked and placed within easy reach of ship's tackle for expeditious loading. Young pays $15,000 annual consideration to the Southern Pacific Terminal Company. Other than this $15,000 no charge of any sort, whether for wharfage, storage, or other service, is paid by Young to the Terminal Company.

Young inaugurated the system of grinding cake into meal and sacking it at the port of departure. Prior to the time he commenced this business at Galveston on pier C, except for a very short time at Port Arthur and Sabine Pass, where the facilities were inadequate, the custom of the trade was to grind the cake at
204 the producing mills in the interior, and there sack it and ship to the port of departure. The method inaugurated by Young permitted him to ship the cotton seed cake in cars in bulk to Galveston where he ground and sacked it as aforesaid.

At Galveston freight intended for local consumption is granted forty-eight (48) hours' free time to unload it from the cars. If it is intended for export, whether brought to Galveston on local bills of lading or on through bills, it is allowed ten (10) days' free time. By reason of the space which Young has on pier C, and by reason of the methods adopted by him for unloading the cake shipped into Galveston by him, he unloads it within the free time allowed and hence does not have to pay demurrage.

All railroads entering Galveston allow 12½ cents per short ton for unloading all export freight from the cars to the wharves, paid by the railroads to the person who does the unloading.

All cotton seed meal and cake passing over the piers A and B pay the wharfage of 20 cents per short ton. Said Young pays no wharfage other than as the same may be included in said flat sum of $15,000. If any exporter handles cotton seed meal or cake over pier C the wharfage of 20 cents per ton is paid by him to said Young.

Freight is regularly loaded from the wharves at ship's side into hold by stevedores under the employment of a contractor who undertakes to do the loading. This loading charge is paid the contractor by the ship and is included in the ship's freight charges. Young, with his own employés, unloads the freight consigned to him for which he receives from the railroad company bringing the

freight to Galveston the allowance of 12½ cents per ton.
205 Handling the freight by men regularly employed by him and used also for other purposes, it thus costs him less than 12½ cents per ton to unload it. Young also does his own stevedoring, receiving from the ships the price of 30 cents per ton. He pays the men he uses for stevedoring 40 cents per hour, and in this way handles his freight more satisfactorily and expeditiously than it is ordinarily handled, and frequently also receives some small margin of profit. Frequently Young charters the ships in which he ships his meal and when he does he himself does the stevedoring. Whenever he has not sufficient freight to fill a slip chartered by him he lets out the space, sometimes at a profit and sometimes at less than it cost him. By chartering his own ships he can often get orders from buyers and ship to ports where steamers do not regularly go and not otherwise accessible.

When he charters ships he gets charterer's commission, and when his ships are promptly dispatched, saving time in loading, he gets the usual allowance for loading ships with dispatch. By reason of all these things above shown he makes a sum equal to 30 to 40 cents per ton more than he would receive if he handled his export product under methods in existence before he established his plant on pier C and adopted the method of the business he follows. This 30 to 40 cents is in addition to the ordinary buying and selling profit.

Young has ample capital for the transaction of a large business, and numerous correspondents in Europe where the great bulk of cotton seed meal and cake is sold. There is one plant at Port Arthur, Texas, two at New Orleans, La., one at Galveston on the property of the Galveston Wharf Company, similar to Young's, for the
206 grinding of meal and cake. None of these said four plants is situated on property belonging to a railway company.

Young pays the highest market price for cotton seed cake, which at times is more than that which can be afforded by his competitors. At times he can undersell his competitors in European markets.

Young's business has increased until his exports from the Port of Galveston exceed those of all other exporters in volume. Since he commenced business some of the exporters who were engaged in business at Galveston prior to the time he commenced business there have ceased exporting. The exports of cake over the wharves of the Terminal Company and the Galveston Wharf Company are indicated from the year 1904 to 1907, inclusive, as follows, expressed in pounds:

Year.	Wharf Company, Galveston	Terminal Company, Southern Pacific
1904	21,493,935	None
1905	12,796,800	44,108,086
1906	16,442,293	107,437,806
1907	21,084,477	211,425,667

From September 1, 1906, to September 1, 1907, Young exported from the port of Galveston about 105,000 tons of cotton seed cake and about the same amount of cotton seed meal. All other exporters

in Galveston did not ship to exceed 50,000 tons of both products during the same period.

Some of the cotton seed cake producers at interior mills in the State complain that Young is able to dominate the Texas market, and that his method of conducting business at Galveston enables him to command the foreign trade and may become a detriment to the cotton seed cake and meal industry, in that Young might
207 acquire a monopoly. Others entertain a contrary opinion. They all agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired, it would be of great benefit to the cotton seed industry.

Since 1904 the export business of cotton seed meal and cake has not increased at New Orleans, and has decreased at Port Arthur and Sabine Pass.

In placing in the contract with Young the expression, "Will route all shipments of cotton seed and cotton seed products purchased or shipped by or to him over the lines of said Terminal Company and its connections, according to the instructions of said Terminal Company from time to time," said Terminal Company intended that said Young should route his shipments over the lines in accordance with the terms of the contract in which the Southern Pacific Company owned the majority of stock as above shown. Said Young has abided by the agreement he made and has routed wherever practicable his shipments of cake over said lines. Since the making of said contract the shipments of cake over those lines has increased, while it has decreased from Texas points over other lines reaching the same territory of production reached by the lines to which the contract refers.

The cake and meal purchased by said Young is bought in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in the first-named State. It is purchased and paid for by said Young on his own account, and is shipped to him on bills of lading and way-bills showing points of origin in said States and destination at Galveston, where it is delivered to said Young, he paying the freight. There is no consumption of cotton seed meal and cake at Galveston, and said Young purchases the cake in order that he can export
208 it. He makes sale of cotton seed meal and cake to his foreign customers, sometimes for immediate delivery and sometimes for future delivery, and irrespective of whether he has the product on hand or not in Galveston at the time he makes the sale. At times he has on hand at Galveston more meal than is sufficient to fill his foreign orders; at other times he has less than is necessary to fill his foreign orders, and must fill them from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and the meal thus ground, and such meal as has been bought outside of Galveston, is used by him in filling such sales as have been made, and such as may be made in the future. At Galveston when he makes shipments to his customers he takes out ship's bill of lading made to his order.

On the present constructed docks of the Galveston Wharf Com-

pany and the Terminal Company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young.

XVIII.

On or about September 11, 1907, Carl Eichenberg, an exporter of cotton seed and its products from the Port of Galveston, filed his petition or complaint before the Interstate Commerce Commission against the Southern Pacific Company and the Southern Pacific Terminal Company, complaining that said companies, by the arrangement with E. H. Young, herein referred to, were violating Section 3 of the act to regulate commerce and giving to said Young an
209 undue and unreasonable preference and advantage over his competitors. Thereafter, by order of the Commission, the Galveston, Harrisburg & San Antonio Railway Company and other railroad companies entering the City of Galveston were made parties defendant. After answers were filed by the defendants a full hearing and investigation of the matters and things involved in said complaint was had by said Commission. Thereafter, and on June 24, 1908, said Commission made its report and its order, which report, containing the Commission's findings of fact and conclusions of law, is correctly set forth as Exhibit A to the Answer of the Interstate Commerce Commision herein, and which order is correctly set forth on pages 26, 27 and 28 of the bill of complaint herein.

XIX.

No rehearing was asked by defendants before the Interstate Commerce Commission. E. H. Young was not made a party to the proceedings before the Interstate Commerce Commission, but he appeared and testified at the hearing as a witness for the Terminal Company, and his counsel was present at the hearing when the testimony was taken and engaged in the examination of witnesses. Said Young was present at Washington before the Commission when the case was argued and submitted.

XX.

It is agreed that a full hearing was had before the Commission, but that the above contains all the material facts upon which their report and order were based and from which their findings and conclusions were drawn. Their report and order showing such
210 findings and conclusions, together with the order thereon, are annexed as an exhibit to complainants' bill and the answer of the defendant Interstate Commerce Commission, and are correct copies thereof. Either party hereto shall have the right to refer to such report as fully as if it were herein set out at length. But such report and order are not to be taken as establishing any material fact variant from the facts herein agreed to; nor is any conclusion of fact

or law of the Commission, not warranted by the facts herein agreed to, to be considered as establishing any additional facts.

It is intended in considering this paragraph that said report of the Commission shall have no further effect than if introduced in evidence for the purpose of showing the contents thereof.

The introduction of exhibits called for by complainants' bill is waived as being sufficiently embodied in the above statement.

BAKER, BOTTS, PARKER & GARWOOD,
F. C. DILLARD,
Solicitors for Complainants.
LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission.
MACO STEWART,
Solicitor for E. H. Young.

Indorsements: No. 504 In Equity. Southern Pacific Terminal Co., et al., Complainants vs. Interstate Commerce Commission, Defendants. Agreed Statement of Facts. Filed Sept. 23, 1909. C. Dart, Clerk, By G. Predecki, Deputy.

CHARTS

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215 12-31-06—100M. Form 1622. Local (Old Form 983).

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, the Houston, East & West Texas Ry., Houston & Shreveport Railroad.

Sunset Lines.
So. Pac. Term. Co. } Sup. 20 I. C. C. No. 475.
C. G. & S. F. Sup. 20 to I. C. C. No. 544.
M. K. & T. Sup. 20 to I. C. C. No. B-172.
I. & G. N. Sup. 20 to I. C. C. No. 237.

SUPPLEMENT No. 20.

Supplements No. 18 & 20 Include All Changes.

Joint Circular.

"Santa Fe System."
Atchison, Topeka & Santa Fe Ry. }
Gulf Colorado & Santa Fe Ry. } No. 2006-B.
Houston & Tex. Cent. R. R. No. 14-C.
Houston East & West Tex. Ry. }
Houston & Shreveport R. R. } No. 14.
Ft. Forth & Denver City Ry. No. 258-E.
Galv. Houston & Henderson R. R. No. 105.
Gulf & Interstate Ry. Co. of Texas.
International & Grt. North'n R. R. (No. 329).
Mo. Kas. & Tex. Ry. Co. No. 564.
Mo. Kas. & Tex. Ry. Co. of Tx. No. 853-T.
S. A. & A. P. Ry. No. 850-H.
"Sunset Route." }
G. L. & S. A. Ry. } No. 14-C.
Texas & New Orleans R. R. }
Southern Pac. Terminal Co.

Terminal Charges at the Port of Galveston, Texas.

Effective April 30th, 1907.

Section 1.

Wharfage charges, applicable to all Traffic given wharfage privileges, whether Domestic, Import or Export Traffic.

Rates and Regulations of wharfage of the Galveston Wharf Co., and Southern Pac. Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay, and are responsible for, the wharfage on the same according to the following rates, to be collected from the vessels or their agents.

Continued on page #2.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

216 12-31-06—100M. Form 1622. Local (Old Form 983).

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

Page 2.

Supplement No. 20 to Sunset Circular No. 14-C.

Item No.	Article.	Cents.	Item No.	Article.	Cents.
234 cancels 228	Broom Corn in Bales per 100 lbs.	2½	238 cancels 232 amends 104	Salt Imported Less than full ship cargo in cts. per 100 lbs.	1½
235 cancels 229 & 90	Pine Apples per 100 lbs.	2½	239 cancels 233	Doors in cts. per 100 lbs.	1¼
236 cancels 230	Pig Iron C. L. per 100 lbs.	1¼	240 cancels 31-160 & 213	Cotton per 100 lbs.	1½
237 cancels 231	Cotton seed Cake C. L. in cts. per 100 lbs.	1			

Item 241 amends 224 and 134. Refer to Section No. 3 Sup. No. 18 and eliminate Effective date of 11/13/07 Inserted in error. Effective date as shown on page one of Supplement 18 governs.
Houston, March 30, 1907.

F-4715.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

217 1-18-07—40M. Form 1622.

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas and New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

In Connection with Morgan's Louisiana & Texas Railroad and Steamship Co., Louisiana Western Railroad.

Sunset Lines.
So. Pac. Term. Co. } Sup. 19 I. C. C. No. 475.
G. C. & S. F. Sup. 19 to I. C. C. No. 344.
M. K. & T. Sup. 19 to I. C. C. No. B-172.
I. & G. N. Sup. 19 to I. C. C. No. 237.

SUPPLEMENT No. 19.

Supplements No. 18 & 19 Include All Changes.

Joint Circular.

"Santa Fe System."
Atchison, Topeka & Santa Fe Ry.
Gulf, Colorado & Santa Fe Ry. } No. 2006-B.
Houston & Tex. Cent. R. R. No. 14-C.
Houston East & West Tex. Ry.
Houston & Shreveport R. R. } No. 14.
Ft. Worth & Denver City Ry. No. 258-E.
Galv. Houston & Henderson R. R. No. 105.
Gulf & Interstate Ry. Co. of Texas.
International & Gr't North'n R. R. (No. 329).
Mo. Kas. & Tex. Ry. Co. No. 564.
Mo. Kas. & Tex. Ry. Co. of Tx. No. 853-T.
S. A. & A. P. Ry. No. 850-H.
"Sunset Route."
G. H. & S. A. Ry.
Texas & New Orleans R. R. } No. 14-C.
Southern Pac. Terminal Co.

Terminal Charges at the Port of Galveston, Texas.

Effective April 26th, 1907.

Section 1.

Wharfage Charges, applicable to all Traffic given Wharfage privileges, whether Domestic, Import or Export Traffic.

Rates and Regulations of Wharfage of the Galveston Wharf Co., and Southern Pac. Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay, and are responsible for, the wharfage on the same according to the following rates, to be collected from the vessels or their agents.

Continued on page #2.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. S. Fay, G. F. A., M. L. & T. R. R. and S. S. Co., La. W. R. R., New Orleans, La.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry., and H. & S. R. R., Houston, Texas.

218 1-18-07—40M. Form 1622.

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

In Connection with Morgan's Louisiana & Texas Railroad and Steamship Company, Louisiana Western Railroad.

Page #2 to Supplement 19 to Sunset Circular 14-C.

Item No.	Article.	Cents.	Item No.	Article.	Cents.
228	Broom corn in bales per 100 lbs.	2½¢	231	Cotton seed cake C. L. in cts. per 100 lbs.	1
229 cancels 90	Pine apples per 100 lbs.	2½¢	232 cancels 104	Salt Imported less than full ship cargo in cts. per 100 lbs.	1½¢
230	Pig Iron C. B. per 100 lbs.	1¼¢	233	Doors in cts. per 100 lbs.	1¼¢

Item 232 amends 224 and 134.
Refer to Section No. 3 Sup. No. 18 and eliminate Effective date of 11, 13/07 Inserted in error. Effective date as shown on page one of Sup. 18 governs.
Houston, March 21st, 1907. F-4707.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. S. Fay, G. F. A., M. L. & T. R. R. and S. S. Co., La. W. R. R., New Orleans, La.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

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222 4/14/06—100M. Form 1622. (Old Form 983.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston East & West Texas Railway, Houston & Shreveport Railroad.

Sunset Route No. 475.
Sou. Pac. Term. Co. 475.
G. C. & S. F. No. 344.
M. K. & T. No. 172.
I. & G. N. No. 237.
} Supplement No. 17 to I. C. C.

SUPPLEMENT No. 17.

(Sup'ts 4, 14, 16 & 17 Includes All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison Topeka & Santa Fe Railway
Gulf Colorado & Santa Fe Railway. } No. 2006-B.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway No. 14.
Houston & Shreveport Railroad No. 14.
Ft. Worth & Denver City No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas and Texas Railway No. 564.
Missouri Kansas and Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
Southern Pacific Terminal Company. } No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective November 15th, 1906.

Item No. 211.

Following apply at Santa Fe Elevator Company, Elevator B, and Elevator A at Galveston, Texas:

1. For unloading cars and fobbing to vessel; One cent per 100 pounds including 15 days' free storage.
2. For re-handling and mixing grain: One half cent per bushel.

3. On all grain received which is held in the elevator for a longer period than 15 days, storage charges will be made as follows:

One cent per bushel for each 30 days of fraction thereof.

4. Charges for drying grain will be made upon application and will be based upon the condition of grain, with a minimum charge of 1¢ per bushel.

5. All grain handled at owner's risk of loss, damage or shrinkage.

Houston, November 30th, 1906.

F-4614.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

223 7/9/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston East & West Texas Ry., Houston & Shreveport Railroad.

Sunset Route No. 475.
So. Pac. Term. Co. 475.
G. C. & S. F. No. 344.
M. K. & T. No. 172.
I. & G. N. No. 237.
} Supplement No. 16 to I. C. C.

SUPPLEMENT No. 16.

(Sup'ts 4, 14, and 16 Includes All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway
Gulf Colorado & Santa Fe Railway. } No. 2006-B.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway No. 14.
Houston & Shreveport Railroad No. 14.
Ft. Worth and Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf and Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 564.
Missouri Kansas and Texas Railway of Texas No. 853-T.

San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
Southern Pacific Terminal Company.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective as Noted.

Effective October 23rd, 1906.

Section L.

Wharfage charges applicable on all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Company.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same according to the following rates to be collected from vessels or their Agents.

Item.	Articles.	Cents.	Item.	Articles.	Cents.
208 cancels 206	Wheat, Bran per 100 pounds	1	209 cancels 207	Cotton Seed Cake per 100 pounds	1

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

224 7/9/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

Sheet No. 2.

To Supplement No. 16 to Joint Circular.

(Sunset Route No. 14-C.)

Effective December 12th, 1906.

Item No. 210 cancels 205.
The I. & G. N. R. R., G. C. & S. F. Ry., M. K. & T. Ry., & G. H. &

S. A. Ry. will absorb the Custom House brokerage charges on import traffic handled via its line, subject on business to Houston, Tex., to the absorption limit provided in third paragraph item 166 Section 4 of supplement No. 4 of circular.

(Auth'y A. C. F. letter 11-7-06 file F-2371.)

Houston, November 8th, 1906.

F-4595.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.

J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

225 7-9-06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

Sunset Route No. 475.
So. Pac. Term. Co. 475.
G. C. & S. F. No. 344.
M. K. & T. No. 172.
I. & G. N. No. 237.
} Supplement No. 15 to I. C. C.

SUPPLEMENT No. 15.

(Sup'ts 4, 14 & 15 Includes All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway. } 14.
Houston & Shreveport Railroad. }
Ft. Worth and Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 853-T.
Missouri Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.

"Sunset Route":
Galveston Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
Southern Pacific Terminal Company.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective October 23rd, 1906.

Section 1.

Wharfage charges applicable on all traffic given wharfage privileges whether Domestic Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Company.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same according to the following rates to be collected from vessel- or their agents.

Item.	Articles.	Cents.	Item.	Articles.	Cents.
206	Wheat, Bran per 100 pounds	1	207	Cotton seed cake per 100 pounds	1

Houston, Sept. 19th, 1906.

F-4552.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

226 4/14/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston East & West Texas Railway, Houston & Shreveport Railroad.

Supplement No. 14 to I. C. C. { Sunset Route No. 475. / So. Pac. Term. Co. No. 475. / G. C. & S. F. No. 344. / M. K. & T. No. 172. / I. & G. N. No. 237.

SUPPLEMENT No. 14.

(Sup'ts 4 and 14 Includes All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway. } No. 14.
Houston & Shreveport Railroad. }
Ft. Worth & Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 853-T.
Missouri Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway. }
Texas & New Orleans Railroad. } No. 14-C.
Southern Pacific Terminal Company. }

Terminal Charges at the Port of Galveston, Texas.

Effective October 10th, 1906.

Section L.

Wharfage charges applicable on all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same according to the following rates to be collected from the vessel- or their Agents.

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

227 7/9/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston East & West Texas Ry., Houston & Shreveport Railroad.

Sheet No. 2.

To Supplement No. 14 *to Joint Circular.*

(Sunset Route No. 14-C.)

Item.	Articles.	Cents.	Item.	Articles.	Cents.
195 cancels 67 & 186	Ixtle per 100 lbs.	1¼	198 cancels 189	Beer bottled per 100 pounds	2½
196 cancels 96 & 187	Rice in barrels per 100 pounds	1	199	Guayule per 100 lbs.	1¼
197 cancels 77 & 188	Lumber, Pitch, Pine for export per 1,000 feet		cancel 200	Rubber crude per 100 pounds	2½

Item No. 201 cancels 180, 181 184 & 190.

Refer to items 180 and 181 covering wharfage charges on cotton seed Meal and Cake from Indian & Oklahoma Territories and Texas, when routed via G. H. & S. A. Ry., also reference to I. & G. N. extending Terminal facilities at Galveston as named in item 181 and cancel same.

Item No. 202 amends 166 and Cancels 178, 182, 185 and 191.

Refer to Section 4 item 166 paragraph 3 and amend as follows: Bagging and ties loaded from City warehouses. (Loading charges will be absorbed on bagging and ties destined to Texas points loaded into cars from wharves if received at Galveston by vessel.)

Item No. 203 cancels 192. Lumber, Brick, Sand and Shell remain-

ing on wharf after first ten days covered by original wharfage will be charged additional wharfage as follows: Lumber 5 cents per 1,000 ft., per day, Sand and Shell 1 cent per cubic yard per day, Brick 5 cents per 1,000 per day.

Item No. 204 cancels 138 and 193.

Elevator charges: The Galveston Elevator charges on all export grain will not be absorbed by rail lines.

Item No. 205:

The I. & G. N. R. R. & G. H. & S. A. Ry. will absorb the Custom House brokerage charges on import traffic handled via its line, subject on business to Houston, Tex., to the absorption limit provided in third paragraph item 166 section 4 of supplement No. 4 of Circular.

Houston, Sept. 8th, 1906.

F-4543.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

228 7/9/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston East & West Texas Ry., Houston & Shreveport Railroad.

Sunset Route No. 475.
So. Pac. Term. Co. No. 475.
G. C. & S. F. No. 344.
M. K. & T. No. 172.
I. & G. N. No. 237.
} Supplement No. 13 to I. C. C.

SUPPLEMENT No. 13.

(Supplements Nos. 4, 12 & 13 Include All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway } No. 14.
Houston & Shreveport Railroad. }
Ft. Worth & Denver City Railway No. 258-E.

Galveston, Houston & Henderson Railroad No. 105.
Gulf and Interstate Railway of Texas.
International & Great Northern R. R. No. 329.
Missouri, Kansas & Texas Railway No. 564.
Missouri Kansas & Texas Ry. of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway
Texas & New Orleans Railroad.
Southern Pacific Terminal Company.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective Sept. 29, '06.

Item 193 Cancels 138.

Elevator Charges.—The Galveston Elevator Charges for the first fifteen days will be absorbed by rail lines (when tariffs so specify only) on all export grain except that originating in the State of Texas.

Houston, Tex., August 29th, 1906.
(Auth. 4534.)

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

229 4/14/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston East & West Texas Ry., Houston & Shreveport Railroad.

Supplement No. 12 to I. C. C.
Sunset Route No. 475.
So. Pac. Term. Co. No. 475.
G. C. & S. F. No. 344.
M. K. & T. No. 172.
I. & G. N. No. 237.

SUPPLEMENT No. 12.

(Cancels No. 10; Sup'ts 4 and 12 Includes All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.

Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway. } No. 14.
Houston & Shreveport Railroad. }
Ft. Worth & Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf and Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 564.
Missouri Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway. }
Texas & New Orleans Railroad. } No. 14-C.
Southern Pacific Terminal Company. }

Terminal Charges at the Port of Galveston, Texas.

Effective as Noted.

Effective August 29, 1906.

Section 1.

Wharfage charges applicable on all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same according to the following rates to be collected from the vessels or their Agents.

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

230 4/14/06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston East & West Texas Railroad, Houston & Shreveport Railroad.

Sheet No. 2.

To Supplement No. 12 *to Joint Circular.*

(Sunset Route No. 14-C.)

Item.	Articles.	Cents.	Item.	Articles.	Cents.
186 cancels 67	Ixtle per 100 lbs.	1¼	188 cancels 77	Lumber, pitch, pine for export per 1,000 feet	30
187. cancels 96	Rice in barrels per 100 pounds	1	189	Beer bottled per 100 lbs.	2½

Item No. 190 cancels 180, 181 & 184.

Effective August 1st, 1906.

Refer to items 180 and 181 covering wharfage charges on Cotton seed meal and cake from Indian & Oklahoma Territories and Texas, when routed via G. H. & S. A. Ry. also reference to I. & G. N. extending Terminal facilities at Galveston as named in item 181 and cancel same.

Item No. 191 amends 166 & cancels 178, 182 & 185.

Refer to Section 4 item 166 paragraph 3 and amend as follows:

Bagging and Ties loaded from city warehouses. (Loading charges will be absorbed on bagging and ties destined to Texas points loaded into cars from wharves, if received at Galveston by vessel.)

Item No. 192:

Lumber Brick, Sand and Shell remaining on wharf after first ten days covered by original wharfage will be charged additional wharfage, as follows: Lumber 5 cents per 1,000 feet per day, Sand and Shell 1 cent per cubic yard per day, Brick 5 cents per 1,000 per day.

Houston, August 23rd, 1906.

F-4529.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.

C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

231 11-05—50M. Form 983.

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Supplement No. 11 to I. C. C. { Sunset Route No. 475. / So. Pac. Term. Co. No. 475. / G. C. & S. F. No. 344. / M. K. & T. No. 172. / I. & G. N. No. 237.

SUPPLEMENT No. 10.

(Cancels No. 10; Sup'ts 4 and 11 Include All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway } 14.
Houston & Shreveport Railroad. }
Ft. Worth & Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 564.
Missouri Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway }
Texas & New Orleans Railroad. } 14-C.
Southern Pacific Terminal Company. }

Terminal Charges at the Port of Galveston, Texas.

Effective as Noted.

Effective December 1st, 1905.

Section 1.

Wharfage charges applicable on all traffic given wharfage privileges whether Domestic Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Rate.
183 cancels 74.	Pine lumber per 1,000 feet.....	30

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

232 11/05—50M. Form 983.

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sheet No. 2.

To Supplement No. 11 *to Joint Circular.*

(Sunset Route No. 14-C.)

Item No. 184 cancels 180 and 181.

Effective Aug. 1st, 1906.

Refer to Items 180 and 181 covering wharfage charges on Cotton Seed Meal and Cake from Indian & Oklahoma Territories and Texas, when routed via G. H. & S. A. Ry. also reference to I. & G. N. extending Terminal facilities at Galveston as named in item 181 and cancel same.

Item No. 185 amends 166 and cancels 178 and 182.

Refer to Section 4 item 166 paragraph 3 and amend as follows:

Bagging and ties loaded from City warehouses. (Loading charges will be absorbed on bagging and ties destined to Texas points loaded into cars from wharves, if received at Galveston by vessel.)

Houston, June 4th, 1906.

F-4457.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

233 2-06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston East & West Texas Railway, Houston & Shreveport Railroad.

Supplement No. 10 to I. C. C. { Sunset Route No. 475. / So. Pac. Term. Co. No. 475. / G. C. & S. F. No. 344. / M. K. & T. No. 172. / I. & G. N. No. 237.

SUPPLEMENT No. 10.

(Cancels No. 9; Sup'ts 4 and 10 Include All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway } No. 14.
Houston & Shreveport Railroad. }
Ft. Worth & Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 564.
Missouri Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway. }
Texas & New Orleans Railroad. } No. 14-C.
Southern Pacific Terminal Company. }

Terminal Charges at the Port of Galveston, Texas.

Effective as Noted.

Effective December 1st, 1905.

Section 1.

Wharfage charges applicable on all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Cents.
179 cancels 74.	Pine lumber per 1,000 feet.....	30

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and F. & S. R. R., Houston, Texas.

234 2/6/—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston East & West Texas Railway, Houston & Shreveport Railroad.

Sheet No. 2.

To Supplement No. 10 to Joint Circular.

(Sunset Route No. 14-C.)

Section 4.

Wharfage Charges.

Item No. 180 amends 139.

6. On cotton seed cake and meal from stations in Indian and Oklahoma Territories and Texas, when routed via G. H. & S. A. Ry.

Item No. 181.

Effective October 23rd, 1905.

The International & Great Northern R. R. Company having extended their Terminal facilities at Galveston by leasing from the Galveston Wharf Company the privilege of handling shipments of cotton seed cake and meal over the wharves of that Company there will be no wharfage charge at Galveston on this commodity when

handled over the rails of the I. & G. N. R. R. and passing over the wharves of the Galveston Wharf Co.

Item No. 182 amends 166 and cancels 178.

Refer to Section 4 item 166 paragraph 3 and amend as follows:

Bagging and ties loaded from City warehouses. (Loading charges will be absorbed on bagging and ties destined to Texas points loaded into cars from wharves, if received at Galveston by vessel.)

Houston, May 10, 1906.

F-4439.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

235 2-06—100M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston East & West Texas Railway, Houston & Shreveport Railroad.

Supplement No. 9 to I. C. C. { Sunset Route No. 475. / So. Pac. Term. Co. No. 475. / G. C. & S. F. No. 344. / M. K. & T. No. 172. / I. & G. N. No. 237. }

SUPPLEMENT No. 9.

(Cancels No. 8; Sup'ts 4 and 9 Include All Changes.)

To Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway No. 2006-B.
Gulf Colorado & Santa Fe Railway.
Houston & Texas Central Railroad No. 14-C.
Houston East & West Texas Railway. } No. 14.
Houston & Shreveport Railroad. }
Ft. Worth & Denver City Railway No. 258-E.
Galveston Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri Kansas & Texas Railway No. 564.
Missouri Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.

"Sunset Route":
Galveston Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
Southern Pacific Terminal Company.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective as Noted.

Effective December 1st, 1905.

Section 1.

Wharfage charges, applicable on all traffic given wharfage privileges whether Domestic Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for, the wharfage on the same according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Cents.
175 cancels 74.	Pine lumber per 1,000 feet.....	30

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

(Local.)

"Sunset Route."

Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, Houston, East & West Texas Railway, Houston & Shreveport Railroad.

Sheet No. 2.

To Supplement No. 9 to Joint Circular.

(Sunset Route No. 14-C.)

Section 4.

Wharfage Charges.

Item No. 176 amends 139.

6. On Cotton Seed cake and meal from stations in Indian and Oklahoma Territories and Texas, when routed via G. H. & S. A. Ry.

Item No. 177.

Effective October 23rd, 1905.

The International & Great Northern R. R. Company having extended their terminal facilities at Galveston by leasing from the Galveston Wharf Company the privilege of handling shipments of cotton seed cake and meal over the wharves of that Company, there will be no wharfage charge at Galveston on this Commodity when handled over the rails of the I. & G. N. R. R. and passing over the wharves of the Galveston Wharf Company.

Item No. 178 Amends 166.

(Refer to Section 4 Item 166 paragraph 3 and cancel same.)

Houston, April 6th, 1906.

F-4410.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

237 9-05—50M. Form 983.

"Sunset Route."

Galveston, Harrisburg & San Antonio Railway, Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sunset Route.
So. Pac. Term. Co. } Sup. 8 to I. C. C. No. 475.

I. & G. N. Sup. 8 to I. C. C. No. 237.
M. K. & T. Sup. 8 to I. C. C. No. 172.
G. C. & S. F. Sup. 8 to I. C. C. No. 344.

SUPPLEMENT No. 8.

(Cancels No. 7.)

To Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway } No. 2006-B.
Gulf Colorado & Santa Fe Railway. }
Houston & Texas Central Railroad No. 14-C.
Houston, East & West Texas Railway.
Houston & Shreveport Railroad No. 14.

Ft. Worth & Denver City Railway No. 258-E.
Galveston, Houston & Henderson Railroad No. 105.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri, Kansas & Texas Railway No. 564.
Missouri, Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 550-H.
"Sunset Route":
Galveston Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
Southern Pacific Terminal Company.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective as Noted.

Effective December 1st, 1905.

Section 1.

Wharfage charges, applicable to all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for the wharfage on the same, according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Cents.
172 cancels 74.	Pine lumber per 1000 feet.	30

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
W. J. Craig, G. F. A., N. Y. T. & M. and G. W. T. & P. Rys., Victoria, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and G. H. & N. Rys., H. & T. C. R. R., H. E. & W. T. Ry. and H. & S. R. R., Houston, Texas.

238 9-05—50M. Form 983.

"Sunset Route."

Galveston, Harrisburg & San Antonio Railway, Texas & New Orleans Railroad.

Houston, East and West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sheet No. 2.

SUPPLEMENT No. 8.

To Joint Circular.

(Sunset Route No. 14-C.)

Section 4.

Item No. 173 amends 139.

Wharfage Charges.

6. On cotton seed cake and meal from stations in Indian and Oklahoma Territories and Texas, when routed via G. H. & S. A. Ry.

Item No. 174.

Effective October 23rd, 1905.

The International & Great Northern Railroad Company having extended their terminal facilities at Galveston by leasing from the Galveston Wharf Company the privilege of handling shipments of cotton seed cake and meal over the wharves of that Company there will be no wharfage charge at Galveston on this commodity when handled over the rails of the I. & G. N. R. R. Co. and passing over the wharves of the Galveston Wharf Company.

Houston, November 9th, 1905.

F-4282.
R-1356.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
W. J. Craig, G. F. A., N. Y. T. & M. and G. W. T. and P. Rys., Victoria, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and G. H. & N. Rys., H. & T. C. R. R., H. E. & W. T. Rys. and H. & S. R. R., Houston, Texas.

239 8-05—50M. Form 983.

"Sunset Route."

Galveston, Houston & Northern Railway, Galveston, Harrisburg & San Antonio Railway, Gulf, Western Texas & Pacific Railway, New York, Texas & Mexican Railway, Texas & New Orleans Railroad.

Houston, East and West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sunset Route.
G. H. & N. Ry.
So. Pac. Ter. Co.
} Sup. 7 to I. C. C. No. 476.

G. C. & S. F. Sup. 7 to I. C. C. No. 344.
M. K. & T. Sup. 7 to I. C. C. No. 172.
I. & G. N. Sup. 7 to I. C. C. No. 237.

SUPPLEMENT No. 7.

(Cancels No. 6.)

To Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway
Gulf Colorado & Santa Fe Railway } No. 2006-B.
Houston & Texas Central Railroad No. 14-C.
Houston, East & West Texas Railway
Houston & Shreveport Railroad. } No. 14.
Ft. Worth & Denver City Railway No. 258-E.
Galveston, Houston & Henderson Railroad No. 105.
(Galveston, Houston & Northern Railway No. 14-C.)
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri, Kansas & Texas Railway Co. No. 564.
Missouri, Kansas & Texas Railway of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 850-H.
"Sunset Route":
Galveston, Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
New York, Texas & Mexican Railway.
Gulf, Western Texas & Pacific Railway.
Southern Pacific Terminal Co.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective at Once.

Section 1.

Wharfage charges, applicable to all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay, and are responsible for, the wharfage on the same, according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Cents.
170 cancels 74.	Pine lumber per 100 pounds.	1¼

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.

W. J. Craig, G. F. A., N. Y., T. & M. and G., W. T. & P. Rys., Victoria, Texas.

C. K. Dunlap, G. F. A., G., H. & S. A. and G., H. & N. Rys., H. & T. C. R. R., H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

240 6-05—50M. Form 983.

"Sunset Route."

Galveston, Houston & Northern Railway, Galveston, Harrisburg & San Antonio Railway, Gulf, Western Texas & Pacific Railway, New York, Texas & Mexican Railway, Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sheet No. 2.

To Supplement No. 7 to Joint Circular.

(Sunset Route No. 14-C.)

Section 4.

Item No. 171 amends 139.

Wharfage Charges.

6. On cotton seed cake and meal from stations in Indian and Oklahoma Territories and Texas, when routed via G., H. & S. A. Ry. Houston, October 19th, 1905.

F-4264.
R-1347.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
W. J. Craig, G. F. A., N. Y., T. & M. and G., W. T. & P. Rys., Victoria, Texas.
C. K. Dunlap, G. F. A., G., H. & S. A. and G., H. & N. Rys. H. & T. C. R. R., H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

241 9-05—50M. Form 983.

"Sunset Route."

Galveston, Houston & Northern Railway, Galveston, Harrisburg & San Antonio Railway, Gulf, Western Texas & Pacific Railway, New York, Texas & Mexican Railway, Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sunset Route.
G., H. & N. R'y.
So. Pac. Ter. Co.
} Sup. 6 to I. C. C. No. 475.

G., C. & S. F. Sup. 6 to I. C. C. No. 344.
M., K. & T. Sup. 6 to I. C. C. No. B-172.
I. & G. N. Sup. 6 to I. C. C. No. 237.

SUPPLEMENT No. 6.

(Cancels No. 5)

To Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway.
Gulf, Colorado & Santa Fe Railway No. 2006-B.
Houston & Texas Central Railroad No. 14-C.
Houston, East & West Texas Railway No. 14.
Houston & Shreveport Railroad.
Ft. Worth & Denver City Railway No. 258-E.
Galveston, Houston & Henderson Railroad No. 105.
Galveston, Houston & Northern Railway No. 14-C.
Gulf & Interstate Railway of Texas.
International & Great Northern Railroad No. 329.
Missouri, Kansas & Texas Railway Co. No. 564.
Missouri, Kansas & Texas Railway of Texas, No. 853-T.
San Antonio & Aransas Pass Railway No. 850-H.
"Sunset Route":
Galveston, Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
New York, Texas & Mexican Railway.
Gulf, Western Texas & Pacific Railway.
Southern Pacific Terminal Co.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective at Once.

Section 1.

Wharfage charges applicable to all traffic given wharfage privileges whether Domestic, Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay and are responsible for, the wharfage on the same according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Cents.
187 cancels 74.	Pine lumber per 100 pounds.	1¼

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
W. J. Craig, G. F. A., N. Y., T. & M. and G., W. T. & P. Rys., Victoria, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and G. H. & N. Rys., H. & T. C. R. R., H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

242 9-05—50M. Form 983.

"Sunset Route."

Galveston, Houston & Northern Railway, Galveston, Harrisburg & San Antonio Railway, Gulf, Western Texas & Pacific Railway, New York, Texas & Mexican Railway, Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sheet No. 2.

To Supplement No. 6 to Joint Circular.

(Sunset Route No. 14-C.)

Section 4.

Item No. 169 cancels 139.

Wharfage Charges.

Wharfage charges will only be absorbed when tariffs so specify and as follows:

1. On all import traffic destined to Texas, interstate points and Mexico.

2. On Cotton Seed cake and meal from stations in Indian and Oklahoma Territories, Arkansas, Louisiana and Texas.

Houston, October 10th, 1905.

F-4256.
R-1343.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
W. J. Craig, G. F. A., N. Y., T. & M. and G. W. T. and P. Rys., Victoria, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A. and G. H. & N. Rys., H. & T. C. R. R., H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

243 8-05—50M. Form 983.

"Sunset Route."

Galveston, Houston & Northern Railway, Galveston, Harrisburg & San Antonio Railway, Gulf, Western Texas & Pacific Railway, New York, Texas & Mexican Railway, Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sunset Route.
G. H. & N. R'y.
So. Pac. Ter. Co.
} Sup. 5 to I. C. C. No. 475.

G. C. & S. F. Sup. 5 to I. C. C. No. 344.
M. K. & T. Sup. 5 to I. C. C. No. B-172.
I. & G. N. Sup. 5 to I. C. C. No. 237.

Supplement No. 5 to Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway.
Gulf, Colorado & Santa Fe Railway No. 2006-B.
Houston & Texas Central Railroad No. 14-C.
Houston, East & West Texas Railway.
Houston & Shreveport Railroad.
} No. 14.
Fort Worth & Denver City Railway No. 253-E.
Galveston, Houston & Henderson Railroad No. 105.
Galveston, Houston & Northern Railway No. 14-C.
Gulf & Interstate R'y Co. of Texas.
International & Great Northern Railroad No. 329.
Missouri, Kansas & Texas Railway Co. No. 564.
Missouri, Kansas & Texas R'y Co. of Texas No. 853-T.
San Antonio & Aransas Pass Railway No. 850-H.

"Sunset Route":
Galveston, Harrisburg & San Antonio R'y.
Texas & New Orleans Railroad.
New York, Texas & Mexican Railway.
Gulf, Western Texas & Pacific Railway.
Southern Pacific Terminal Co.
} No. 14-C.

Terminal Charges at the Port of Galveston, Texas.

Effective Sept. 1st, 1905.

Section 1.

Wharfage charges applicable to all traffic given wharfage privileges whether Domestic Import or Export traffic.

Rates and regulations of wharfage of the Galveston Wharf Co. and Southern Pacific Terminal Co.

All vessels and their owners landing goods on the wharves thereby contract to pay, and are responsible for, the wharfage on the same, according to the following rates to be collected from the vessels or their agents.

Item.	Articles.	Cents.
167 cancels 74.	Pine lumber per 100 pounds.	1¼

(Galveston Wharf Co. Letter 8-9-1905.)

Continued.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.

W. J. Craig, G. F. A., N. Y., T. & M. and G. W. T. & P. Rys., Victoria, Texas.

C. K. Dunlap, G. F. A., G. H. & S. A. and G. H. & N. Rys. H. & T. C. R. R., H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

244 8-05—50M. Form 983.

"Sunset Route."

Galveston, Houston & Northern Railway, Galveston, Harrisburg & San Antonio Railway, Gulf, Western Texas & Pacific Railway, New York, Texas & Mexican Railway, Texas & New Orleans Railroad.

Houston, East & West Texas Railway, Houston & Shreveport Railroad, Houston & Texas Central Railroad.

Sheet No. 2.

Sunset Route.
G. H. & N. R'y.
So. Pac. Term. Co. } Sup. 5 to I. C. C. No. 475.

G. C. & S. F. Sup. 5 to I. C. C. No. 344.
M. K. & T. Sup. 5 to I. C. C. No. B-172.
I. & G. N. Sup. 5 to I. C. C. No. 237.

Supplement No. 5 to Joint Circular.

"Santa Fe System":
Atchison, Topeka & Santa Fe Railway.
Gulf, Colorado & Santa Fe Railway. } No. 2006-B.
Houston & Texas Central Railroad No. 14-C.
Houston, East and West Texas Railway.
Houston & Shreveport Railroad. } No. 14.
Ft. Worth & Denver City Railway No. 258-E.
Galveston, Houston & Henderson Railroad No. 105.
Galveston, Houston & Northern Railway No. 14-C.
Gulf & Interstate R'y of Texas.
International & Great Northern Railroad No. 329.
Missouri, Kansas & Texas Railway Co. No. 564.
Missouri, Kansas & Texas R'y Co. of Texas No. 863-T.
San Antonio & Aransas Pass Railway No. 850-H.
"Sunset Route":
Galveston, Harrisburg & San Antonio Railway.
Texas & New Orleans Railroad.
New York, Texas & Mexican Railway.
Gulf, Western Texas & Pacific Railway.
Southern Pacific Terminal Co. } No. 14-C.

W. B. Biddle, Chicago, Ill., F. T. M., "Santa Fe System."
H. A. Jones, Houston, Texas, F. T. M., G. H. & N., G. H. & S. A., H. & T. C., H. E. & W. T. and H. & S. Rys.
J. W. Allen, Dallas, Texas, G. F. A., M. K. & T. R'y.
Y. Van den Berg, Galveston, Texas, A. G. F. A., G. C. & S. F. R'y.

T. G. Beard, Houston, Texas, G. F. A., T. & N. O. R. R.
J. R. Christian, Houston, Texas, A. G. F. A., G. H. & N., G. H. & S. A., H. & T. C., H. E. & W. T., and H. & S. Rys.
W. F. Sterley, Ft. Worth, Tex., G. F. A., Ft. W. & D. C. R'y.
G. H. Turner, Palestine, Texas, G. F. A., I. & G. N. R. R.
J. S. Hershey, Galveston, Texas, G. F. A., G. C. & S. F. R'y.
C. K. Dunlap, Houston, Texas, G. F. A., G. H. & N., G. H. & S. A., H. & T. C., H. E. & W. T. and H. & S. R. R.
W. F. McClure, Galveston, Texas, G. F. A., G. H. & H. R. R.
C. R. Kitchell, Galveston, Texas, T. M., G. & I. S. R'y Co. of Tex.
C. Haile, St. Louis, Mo., T. M., K. M. & T. R'y System.
J. C. Mangham, San Antonio, Tex., G. F. A., S. A. & A. P. R'y.
Houston, August 22nd, 1905.

F-4214.
R-1322.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
W. J. Craig, G. F. A., N. Y., T. & M. and G. W., T. & P. Rys., Victoria, Texas.
C. K. Dunlap, G. F. A., G. H. & S. A., and G. H. & N. Rys., H. & T. C. R. R., H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

CHARTS

TOO

LARGE

FOR

FILMING

264 12-11-06. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Traffic Department, Houston, Texas.

Supplement No. 4 to I. C. C. { G. H. & S. A. No. 645. / I. & G. N. R. R. No. 403.

(Supplement- Nos. 3 and 4 include all changes.)

SUPPLEMENT No. 4.

(Supplements 3 and 4 include all changes.)

To Joint Circular.

G. H. & S. A. Ry. No. 14-D.
G. C. & S. F. Ry. No. 2006-C.
G. H. & H. R. R. No. 105-A.
G. & I. S. Ry. No. 108.
I. & G. N. R. R. No. 418.
M. K. & T. Ry. of Tex. No. 1086.

Showing Terminal Charges.

(Other than Storage and Switching.)

At the Port of Galveston, Texas.

Applying on Both Domestic and Foreign Traffic.

Mailed to I. C. C. August 28th, 1907.

Effective at Once.

Section 6.

Item 22.

On cotton covered by through bills of lading via Galveston, including those issued on Ocean freight engagements, shippers must give written guarantee that they will pay the demurrage at rate of $1.00 per day, or fraction of a day. Sundays and holidays excepted, covering the detention of cars at Galveston beyond the five (5) days' free time allowance.

Houston, August 28th, 1907.

F-4844.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. R'y, Houston, Texas.

23—821

265 4-9-07—50M. Form 1622. (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

Supplement No. 3 to { G. H. & S. A. I. C. C. No. 645. / I. & G. N. I. C. C. No. 403.

(Sup. No. 3 includes all changes.)

SUPPLEMENT No. 3.

(Sup. 3 includes all changes.)

To Joint Circular.

G. H. & S. A. R. R. No. 14-D.
G. C. & S. F. Ry. No. 2006-C.
G. H. & H. R. R. No. 105-A.
G. I. S. Ry. No. 108.
I. & G. N. R. R. No. 414.
M. K. & T. Ry. of Tex. 1086.

Showing Terminal Charges.

(Other than Storage and Switching.)

At the Port of Galveston, Texas.

Applying on both Domestic and Foreign Traffic.

Mailed to I. C. C. July 19th, 1907.

Effective as Noted.

Effective July 9th, 1907.

Item 20 cancels 11.

(Reissue.) Custom House Brokerage Charges.—On Import traffic the Custom House entries will be made by the Galveston Terminal Lines, or expense for same will be absorbed by them, subject to the absorption limit provided in Item 9.

Lines parties to this circular will absorb cost of cording and sealing less than carload shipments of bonded freight when such shipments cannot be forwarded in cars under Custom House seals.

(Authy. G. H. T. letter 5-17-07 file 3001.)

Effective August 13th, 1907.

Item 21 amends 1.
(Reissue.) Correct the rating on bagging, per 100 pounds to 1½ cents instead of 2½ cents.
(Auth. J. S. H. File J. W. 65929 6-27-07.)
Add to list of articles, Fullers' Earth, at rate 1¼ cents per 100 pounds.
(Auth. J. S. H. File J. W. 63511 6-13-07.)

NOTE.—Refer to Supplement No. 1 of July 8th, and correct to No. 2 account number being a duplicate of No. 1 issued June 4th. Also all I. & G. N. R. R. I. C. C. No. 403.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R. The H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.
Houston July 19th, 1907.

266 12-11-06—50M. Form 1622. (Old Form 983.

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Traffic Department, Houston, Texas.

Supplement No. 2 to I. C. C. 645.

SUPPLEMENT No. 2.

To Joint Circular.

G. H. & S. A. Ry. No. 14-D.
G. C. & S. F. Ry. No. 2006-C.
G. H. & H. R. R. No. 105-A.
G. I. S. Ry. No. 108.
I. & G. N. R. R. No. 414.
M. K. & T. Ry. of Tex. No. 1086.

Showing Terminal Charges.

(Other than Storage and Switching.)

At the Port of Galveston, Texas.

Applying on both Domestic and Foreign Traffic.

Mailed to I. C. C. July 8, 1907.

Effective August 13, 1907.

Item 19 amends Item 1.
Correct the rate on bagging, per 100 pounds to 1½ cents instead of 2½ cents.

(Auth. J. S. H. file J. W. 65929, June 27th, 1907.)
Add to list of articles, Fullers earth at rate of 1¼ cents per 100 pounds.
(Auth. J. S. H. file J. W. 63511, June 13th, 1907.)
Houston, July 8, '07.

F-4797.

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. R'y, Houston, Texas.

267 & 268 12-31-06—100M. Form 1622 (Old Form 983.)

(Local.)

"Sunset Route."

The Galveston, Harrisburg & San Antonio Ry., Texas & New Orleans Railroad.

Houston & Texas Central Railroad, The Houston, East & West Texas Ry., Houston & Shreveport Railroad.

Supplement No. 1 to I. C. C. 645.

SUPPLEMENT No. 1.

To Joint Circular.

G. H. & S. A. Ry. No. 14-D.
G. C. & S. F. Ry. No. 2006-C.
G. H. & H. R. R. No. 150-A.
G. I. Ry. No. 108.
I. & G. N. R. R. No. 414.
M. K. & T. Ry. of Tex. No. 1086.

Showing Terminal Charges.

(Other than Storage and Switching.)

At the Port of Galveston, Texas.

Applying on both Domestic and Foreign Traffic.

Mailed to I. C. C. July, 1907.

Effective July 1, '07.

Refer to page 3 Section 1 of Circular and correct the rate on bagging per 100 lbs. to 1½ cents instead of 2½ cents.
(Authy. J. S. H. J. W. 65929 June 27/07.

(F-4794.)

T. G. Beard, G. F. A., T. & N. O. R. R., Houston, Texas.
J. R. Christian, G. F. A., The G. H. & S. A. and H. & T. C. R. R., The H. E. & W. T. R'y and H. & S. R. R., Houston, Texas.

269 *Application for Hearing and Order Thereon.*

Filed Oct. 20, 1909.

In U. S. Circuit Court, Southern District of Texas.

Eq. No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
vs.
INTERSTATE COMMERCE COMMISSION et al.

To the Honorable Don A. Pardee, Honorable A. P. McCormick, and Honorable David A. Shelby, Circuit Judges of the United States in and for the Fifth Circuit:

Herein comes the Southern Pacific Terminal Company, Complainant in the above entitled and numbered cause, and shows to the Court that said cause is pending in the United States Circuit court for the Southern District of Texas at Galveston, the same being a bill to enjoin the Interstate Commerce Commission from enforcement of its order No. 1277 of date June 24, 1908 in the complaint of Carl Eichenberg vs. Southern Pacific Terminal Company and others. Complainant shows that defendant, the Interstate Commerce Commission, having regularly appeared therein, answer has been filed and said cause is as to Complainant and said Interstate Commerce Commission ready for submission upon agreed statement of facts and Complainant prays that same be set down for hearing at such early date as may to your Honors seem proper.

SOUTHERN PACIFIC TERMINAL COMPANY, *Complainant,*
By —— ——, *Solicitor.*

270 *Order.*

Now on this the 14 day of October 1909 came on to be heard the foregoing application of Southern Pacific Terminal Company, Complainant, in Equity No. 504, Southern Pacific Terminal Company et al., vs. Interstate Commerce Commission, et al., and it appearing that said *cuase* is ready for submission upon bill, answer and agreed statement of facts, it is ordered that said cause be set down for final hearing at New Orleans, Louisiana, on December 6th 1909, at 11 o'clock A. M.

DON A. PARDEE, *Judge.*
A. P. McCORMICK, *Judge.*
DAVID D. SHELBY, *Judge.*

(Endorsements:) No. 504. Equity. S. P. Terminal Co. et al., vs. Interstate Commerce Commission, et al. Application for hearing and order thereon. Filed Oct. 20, 1909. C. Dart, Clerk, By G. Predecki, Deputy.

271 *Order Overruling Demurrer of Interstate Commerce Commission to Cross-bill of E. H. Young.*

In the Circuit Court of the United States for the Southern District of Texas.

In Equity. No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al.
vs.
INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

Before Pardee, McCormick, and Shelby, Circuit Judges.

On this sixth day of December 1909, this cause came on further to be heard on the demurrer of the Interstate Commerce Commission to the cross bill of E. H. Young against The Southern Pacific Terminal Company and the Interstate Commerce Commission, and was argued,

Whereupon the Court overruled the said demurrer, the Interstate Commerce Commission to answer and said E. H. Young to reply instanter.

(O. K. D. A. P.)

(Endorsements:) No. 504. In Equity. Order overruling demurrer of Interstate Commerce Commission to cross bill of E. H. Young. Filed Dec. 6, 1909. Don A. Pardee, Circuit Judge.

272 *Order for Special Session of the Above-named Court at Galveston on Dec. 23, 1909, at Twelve o'clock M.*

United States Circuit Court of Appeals, Fifth Circuit.

NEW ORLEANS, LA., *Dec.* 17, 1909.

C. Dart, Esq., Clerk U. S. Circuit Court, Galveston, Texas.

DEAR SIR: I enclose herewith order for a special session of the Circuit Court to be held on December 23d 1909 at twelve o'clock M. This special session is ordered for the purpose of entering a decree in the case of The Southern Pacific Terminal Company et al. v. The Interstate Commerce Commission pending in the Court before the three Circuit Judges. You will enter the order on the minutes and notify counsel in the said case.

Yours, &c., DON A. PARDEE.

273 United States Circuit Court, Southern District of Texas.

Order.

Considering Section 669, Revised Statutes of the United States, I, Don A. Pardee, Senior United States Circuit Judge, Fifth Judicial

Circuit, do hereby appoint a special session of the Circuit Court for the above entitled District at Galveston, on the 23rd day of December 1909 at twelve o'clock M.

Witness my hand this 17th day of December 1909.

DON A. PARDEE,
Circuit Judge.

(Endorsement:) United States Circuit Court, Southern District of Texas. Order for special session of the above named Court at Galveston on Dec. 23, 1909 at twelve o'clock M. Filed Dec. 20, 1909. C. Dart, Clerk, by G. Predecki, Deputy.

274 *Final Decree.*

Filed Dec. 23, 1909.

In the United States Circuit Court for the Southern District of Texas. In Equity.

Number 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al., Complainants,
vs.
INTERSTATE COMMERCE COMMISSION et al., Defendants.

This cause coming on to be further heard before the court held by three circuit judges, Hon. Don A. Pardee, Hon. Andrew P. McCormick and Hon. David D. Shelby, and being submitted for final decree on the original bill and answers thereto and replications to said answers, and on the agreed statement of facts filed herein September 23, 1909, and the said cause having been argued by the solicitors for the complainants and solicitors for the defendants, and having been considered by the court, and the court being of opinion that the complainants are not entitled to relief:

It is now ordered, adjudged and decreed by the court that the said original bill be dismissed and that the complainants be taxed with the costs.

At the same time, the cross-bill of the defendant, E. H. Young, herein, and the answers to the same and replications thereto were submitted to the court on the said agreement of facts filed September 23, 1909, for final decree; and the said cause having been argued by solicitors for the cross-complainant and solicitors for the defendants, and having been considered by the court, and the court being of opinion that the said cross-complainant is not entitled to relief:

It is further ordered, adjudged and decreed that the said cross-bill be dismissed, but without prejudice. The cross-complainant is taxed with the costs of his suit.

In open court, this December 23, 1909.

A. P. McCORMICK,
U. S. Circuit Judge.

275 DAVID D. SHELBY,
U. S. Circuit Judge.

Pardee, Circuit Judge, does not concur in the decree in this case.

(Indorsements:) No. 504, Equity. Southern Pacific Terminal Co., et al. vs. Interstate Commerce Commission, et al. Final Decree. Filed December 23, 1909. C. Dart, Clerk, By G. Predecki, Deputy.

276 *Assignment of Errors.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al., Complainants,
vs.
INTERSTATE COMMERCE COMMISSION et al., Defendants.

Assignment of Errors by E. H. Young.

Herein comes E. H. Young and says that in the record and proceedings herein there is manifest error and in connection with his petition for appeal herein presents and files therewith his assignment of errors as to which matters and things he says that the decree entered herein on Dec. 23, 1909, is erroneous to-wit:

I.

The court erred in its decree dismissing defendant Young's cross bill and refusing the relief therein prayed for, to-wit, that the Interstate Commerce Commission be enjoined from enforcing its order and decree annulling a certain contract of lease between the Southern Pacific Terminal Company and the said Young of date September 11, 1906, in that the said order of said Interstate Commerce Commission is invalid and void, because the Interstate Commerce Commission in holding his contract of lease between the Southern Pacific Terminal Company and E. H. Young of date September 11, 1906, whereby for a consideration of $15,000 per annum said company leased for a period of five years the premises in said contract described to said E. H. Young as constituting an unlawful and
277 undue preference in violation of the act to regulate commerce approved Feb'y 4, 1887, and acts amendatory thereof, did therein and thereby assume to control and did control and regulate commerce which was purely intrastate and domestic commerce and did thereby prevent and forbid the said E. H. Young under his said lease from occupying and using certain real property in said lease described lying wholly within the State of Texas for the purpose of manufacturing and warehousing products moving from points within the state of Texas upon local bills of lading to the premises so leased which is within the State of Texas and which at no point of transit passed without the State of Texas and which was and is intrastate commerce and not subject to the orders, rules and regulations of the Interstate Commerce Commission.

II.

The Court erred in dismissing defendant Young's cross bill and refusing the relief prayed for, for that the lease contract of date September 11, 1906, held to be unlawful by the order of the Interstate Commerce Commission of date June 24, 1908, herein sought to be annulled does not under the facts proven herein constitute an unlawful or undue preference to said Young within the terms of Section three of the "Act to Regulate Commerce approved Feb'y 4, 1887, and Acts Amendatory thereof" or any other provision of said act.

III.

The Court erred in dismissing defendant Young's cross bill herein and refusing the relief prayed for, because the order of the Interstate Commerce Commission of date June 24, 1908, herein sought to be annulled is wholly invalid and void, for that it appears from the testimony herein that the lease contract of date September 11, 1906, was taken by E. H. Young for a valuable consideration from the Southern Pacific Terminal Company, the owner of record of the leased premises, and the said Young at the time of making said lease, having no notice or knowledge of any intercorporate relation between the Southern Pacific Terminal Company and the
278 Galveston, Harrisburg & San Antonio Railway Company or between said Terminal Company and the Southern Pacific Company as found by the Interstate Commerce Commission, but said Young entered into said lease solely and wholly with the Southern Pacific Terminal Company a corporation by charter fully authorized and empowered to make such lease.

IV.

The Court erred in dismissing said cross bill of defendant Young against complainant and refusing to grant said Young the relief prayed for in his cross bill against said Southern Pacific Terminal Company, Southern Pacific Company and the Galveston, Harrisburg & San Antonio Railway Company, for that the order of the Interstate Commerce Commission of date June 24, 1908, required said Galveston, Harrisburg and San Antonio Railway Company, Southern Pacific Terminal Company and Southern Pacific Company to desist and refrain for a period of two years from September 1, 1908, from granting and giving to said Young the right to the use of the leased premises under his lease contract while, at the same time, exacting wharfage charges from other shippers and ordered that said Southern Pacific Terminal Company and Southern Pacific Company and the Galveston, Harrisburg & San Antonio Railway Company desist on or before Sept. 1, 1908, and for a period of not less than two years thereafter from allowing to said E. H. Young for his exclusive use the occupancy of the premises leased to said Young, while contemporaneously refusing and denying similar privileges to other shippers and in not granting the alternative prayer of defendant Young that the Terminal Company be required to furnish other shippers piers similar to the leased premises and in not grant-

ing the alternative prayer of said Young that said Terminal Company be restrained and enjoined from making any wharfage charges against other shippers other and different fro mthe rental charges paid by said Young for the leased premises; it appearing from the evidence herein that said Terminal Company had entered
279 into said contract of lease of said Young of date September 11, 1906, and that said Company at the time of the hearing of this cause was vested with the title to additional property similarly situated to that leased to said Young which could be by it leased to other shippers for the same use and under the same terms as the lease- premises had been leased to said Young.

Wherefore this appellant prays that said decree may be reversed and that appellant may have an adjudication and decree in his favor cancelling and declaring null and void said order of the Interstate Commerce Commission and enjoining it from enforcing said order, and in the alternative, should said prayer be refused, said Young prays for decree against the said Southern Pacific Terminal Company requiring said Terminal Company to advance to other shippers of cotton seed cake and meal, whose shipments are offered under similar circumstances and conditions, premises at Galveston, Texas, similar to the premises leased to said Young; and, further, that said Terminal Company be restrained and enjoined from making any wharfage charge against other shippers of cotton seed cake and meal other and different from the rental charges paid by the said Young for the leased premises.

MACO STEWART,
Attorney for Appellant E. H. Young.

(Endorsements:) No. 504. S. P. Terminal Co. et al. Complainants vs. Interstate Commerce Commission, et al. Defendants. Assignments of error. Filed Jan'y 15, 1910. C. Dart, Clerk.

280 *Assignment of Errors.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY et al., Complainants,
vs.
INTERSTATE COMMERCE COMMISSION et al., Defendants.

Assignment of Errors by Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company.

Herein come the appellants, Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, and say that in the record and proceedings herein there is manifest error and in connection with their peti-

tion for appeal herein present and file therewith their assignment of errors as to which matters and things they say that the decree entered herein on December 23, 1909, is erroneous to-wit:

I.

The Court erred in refusing the injunction against defendant, the Interstate Commerce Commission by complainants prayed for and dismissing complainants' bill of complaint against the Defendant, the Interstate Commerce Commission, for that the Southern Pacific Terminal Company, complainant herein, is a wharf Company
281 chartered under the laws of the State of Texas and is not a common carrier nor an appurtenance thereof and the defendant, Interstate Commerce Commission, was and is wholly without jurisdiction to make the order complained of, which order denies Appellant, Southern Pacific Terminal Company, its right to lease or convey a portion of its property owned by it in fee simple and which at the time of the execution of the lease of said property to said E. H. Young was not devoted to any public use.

II.

The Court erred in refusing the relief prayed for by Complainants and in dismissing Complainants' original bill of complaint herein, for that the Southern Pacific Terminal Company a wharf Company chartered under the laws of the State of Texas having power under its charter to sell, lease and convey its property and owning the property leased to defendant, E. H. Young, in absolute fee simple title, had full power to make the contract declared illegal by the Interstate Commerce Commission and that body was and is wholly without jurisdiction or power to deprive said Southern Pacific Terminal Company of such right.

III.

The Court erred in dismissing the original bill of complaint herein and refusing the relief therein prayed for, for that the contract of date the 11th day of September, 1906, by and between the Southern Pacific Terminal Company and E. H. Young which is declared by the Interstate Commerce Commission by its order of June 24, 1908, which order it is sought by the original bill of complaint herein to cancel and annul and the enforcement whereof is therein sought to be enjoined, is in all things a valid and lawful contract between the Southern Pacific Terminal Company and said E. H. Young and under the facts proven herein does not constitute an unlawful or undue preference under the act to regulate commerce approved Feb'y 4, 1887, and the acts amendatory thereof.

282 IV.

The Court erred in its decree dismissing Complainants' original bill and refusing the relief therein prayed for, to-wit the cancellation of said order of the Interstate Commerce Commission in that said

order is invalid and void, because the Interstate Commerce Commission in holding the contract of lease between Complainant Southern Pacific Terminal Company and defendant E. H. Young of date September 11, 1906, whereby for a consideration of $15,000.00 per annum said Southern Pacific Terminal Company leased for a period of five years the premises in said contract described to said E. H. Young to constitute an unlawful and undue preference in violation of the act to regulate commerce approved Feb'y 4, 1887, and acts amendatory thereof did therein and thereby assume to control and did control and regulate commerce which is purely intrastate and domestic and did therein and thereby prevent and forbid the Southern Pacific Terminal Company, a wharf Company chartered under the laws of the State of Texas, and not a common carrier, to lease to said E. H. Young an unused portion of its property; within the State of Texas for the purpose of manufacturing and warehousing products moving from a point within the State of Texas upon local bills of lading to the premises so leased as a depot of concentration also within the State of Texas and which at no point of the transit passed without the State of Texas and which was and is intrastate commerce and not subject to the act of Congress entitled "An Act to Regulate Commerce approved Feb'y 4, 1887, and Acts Amendatory thereof" and not subject to the orders, rules or regulations of the Interstate Commerce Commission.

V.

The Court erred in dismissing Complainants' original bill and in refusing the relief therein prayed for, for that said order of the Interstate Commerce Commission therein sought to be cancelled and enjoined is invalid and void, because the said order directly
283 regulates and controls traffic and commerce which was not and had never been interstate commerce, but which, having moved from points within the State of Texas in continuous transit in said state to the premises leased by said Southern Pacific Terminal Company to said E. H. Young where the same was manufactured and stored and was moved thence directly into ship's hold and thence transported to European ports without the intervention of any common carrier, said transportation and movement of said products being, therefore, intrastate commerce until delivered to and manufactured upon the premises so leased and thereafter foreign commerce transported by water directly from said leased premises to European ports without the intervention of any common carrier; it appearing from the evidence herein that the transportation of such products from points within the State of Texas was upon local bill of lading from such point to said Young at Galveston by railroad at which point said rail transportation wholly ceased, said products being consigned to said Young at said point upon his own account and that after said transportation had wholly ceased and said products were manufactured and their form changed said Young thereafter and as an independent transaction sold the same at European ports and moved the products so sold directly from the warehouse upon said premises into ship's hold for such export; it further ap-

pearing from the evidence herein that said transportation of said products from the point of origin within the State of Texas to said leased premises also within said state whence after manufacture same was sold and exported by water to European ports was not and is not a continuous carriage or shipment by railroad and by water where such rail and water transportation is under any common control, management or arrangement; wherefore said commerce was and is not commerce subject to the act of Congress entitled "An Act to Regulate Commerce approved Feb'y 4, 1887, and Acts Amendatory thereof" or to the orders, rules or regulations of the Interstate Commerce Commission.

284 VI.

The court erred in dismissing complainant's original bill and refusing the relief prayed for, for that the Interstate Commerce Commission in making the order complained of committed error of law in holding and determining that the Southern Pacific Terminal Company did not own in fee simple the premises leased by said contract of date Sept. 11, 1906, to said E. H. Young and in holding that its title to said premises was a conditional title and charged with and affected by a public use and in holding and determining that said Southern Pacific Terminal Company could not lease or convey said premises to E. H. Young for a private purpose, for that the Southern Pacific Terminal Company as shown by the evidence herein owned said premises in fee simple title and had power under its charter to lease and convey the same to said Young and said Interstate Commerce Commission was and is wholly without power, authority or jurisdiction to determine that the title of said Southern Pacific Terminal Company was not a fee simple title or that it had not the right or power to lease or convey same to said E. H. Young said order of the Interstate Commerce Commission being, therefore made without jurisdiction, is wholly invalid and void.

VII.

The Court erred in dismissing complainants' bill herein and refusing the relief prayed for, for that the lease contract of date September 11, 1906, held to be unlawful by the order of the Interstate Commerce Commission of date June 24, 1908, herein sought to be annulled does not under the facts proven herein constitute an unlawful or undue preference within the terms of Section three of the act to regulate commerce, approved Feb'y 4, 1887, and acts amendatory thereof or any other provision of said Act.

VIII.

The Court erred in dismissing complainants' bill herein and refusing the relief prayed for, because the order of the Interstate Commerce Commission of date June 24, 1908, herein sought to be
285 annulled is wholly invalid and void, for that it appears from the testimony herein that the Southern Pacific Terminal Company is not a common carrier nor an appurtenance thereof, but

that it is and was at the time of the order complained of a wharf company chartered under the laws of the State of Texas for the purpose of constructing, buying, leasing owning, maintaining, operating and conveying warehouses, docks and wharves and grain elevators, including the construction, owning and operation of docks on the coast of the State of Texas for the protection and accommodation of ships, boats and all kinds of vessels for navigation and their cargoes and that said wharf Company does not own, operate or control any locomotive or cars or issue any bill of lading or in any manner whatsoever perform the services of a common carrier and that it was not at the time of said order and has never been a common carrier subject to said act to regulate commerce or to the orders, rules and regulation of the Interstate Commerce Commission and it further appearing that the order of the said Interstate Commerce Commission declaring said Southern Pacific Terminal Company to be a common carrier upon the ground that a majority of the stock of the Galveston, Harrisburg & San Antonio Railway Company, a railroad corporation chartered under the laws of the State of Texas, is a common carrier which transports cars and merchandise over the wharves of said Southern Pacific Terminal Company is owned by the Southern Pacific Company, a corporation chartered under the laws of Kentucky which also owns a majority of the stock of the Southern Pacific Terminal Company merges and consolidates the Southern Pacific Terminal Company with said Galveston, Harrisburg & San Antonio Railway Company and makes the said Southern Pacific Terminal Company a common carrier subject to the rules, orders and regulations of the Interstate Commerce Commission, said order and declaration of the Interstate Commerce Commission being wholly erroneous and void, for that said South-
286 ern Pacific Terminal Company owns no stock in said Galveston, Harrisburg and San Antonio Railway Company nor does said Galveston, Harrisburg & San Antonio Railway Company own any stock of the Southern Pacific Terminal Company, but each is an independent and distinct corporation each preserving its corporate identity and each being managed, operated and controlled separately and independently from the other and the ownership of the stock of each by a third corporation or individual can not operate to merge or consolidate the two and convert the Southern Pacific Terminal Company, a wharf Company without power under its charter to act as a common carrier and which in fact, as by the evidence disclosed performs no act or service as a common carrier, into a common carrier or appurtenance thereof, subject to the orders, rules and regulations of the Interstate Commerce Commission.

IX.

The Court erred in dismissing said original bill of complaint as against the said E. H. Young, and refusing to grant complainants the relief as therein prayed for against said Young, for that if said order of the Interstate Commerce Commission therein sought to be annulled was valid, then complainants were entitled to decree against the said E. H. Young cancelling said contract of date Sept. 11, 1906,

between the Southern Pacific Terminal Company and said E. H. Young and enjoining said Young from enforcing the same or in any way interfering with the possession of said Southern Pacific Terminal Company in and to the premises leased to said Young by said contract and enjoining said Young from bringing any suit or action against said complainant Southern Pacific Terminal Company, because of anything growing out of or connected with said contract or with the said order of the Interstate Commerce Commission by said bill sought to be cancelled.

Wherefore, appellants pray that said decree may be reversed and that appellants may have an adjudication and decree in their favor cancelling and declaring null and void said order of defend-
287 ant Interstate Commerce Commission and enjoining it from enforcing said order and in the alternative decree against said E. H. Young as hereinabove specified.

SOUTHERN PACIFIC TERMINAL COMPANY,
SOUTHERN PACIFIC COMPANY,
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By F. C. DILLARD, AND
BAKER, BOTTS, PARKER AND
GARWOOD, AND WM. F. HERRIN,
Attorneys for Appellants.

(Endorsements:) No. 504. Eq. S. P. Terminal Company, et al. Complainants, vs. Interstate Commerce Commission, et al., Defendants. Assignment of errors. Filed Jan'y 15, 1910. C. Dart, Clerk.

288 *Petition for Appeal to Supreme Court of the U. S., and Order Thereon.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Petition for Appeal to the Supreme Court of the United States.

The above named complainants, Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, and E. H. Young, defendant- in the original bill and as cross-complainant against defendant, Interstate Commerce Commission, and against said complainants, each conceiving himself aggrieved by the decree made and entered on Decem-

ber 23, 1909, in the above entitled cause do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herewith and they and each of them pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree and order was made and duly authenticated may be sent to the Supreme Court of the United States.

289 SOUTHERN PACIFIC TERMINAL COMPANY,
SOUTHERN PACIFIC COMPANY,
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
By F. C. DILLARD,
WM. F. HERRIN AND
BAKER, BOTTS, PARKER AND GARWOOD, *Solicitors.*
E. H. YOUNG,
By MACO STEWART, *Solicitor.*

The above and foregoing claim of appeal is allowed this 17th day of January, A. D. 1910.

DON A. PARDEE,
Circuit Judge.
A. P. McCORMICK,
Circuit Judge.
DAVID D. SHELBY,
Circuit Judge.

(Endorsements:) No. 504. Equity. Southern Pacific Terminal Company et al., Complainants vs. Interstate Commerce Commission et al., Defendants. Petition for appeal to Supreme Court of the U. S. and order thereon. Filed Jan'y 29, 1910. C. Dart, Clerk.

290 *Citation on Appeal.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Citation on Appeal.

To the President of the United States, to the Interstate Commerce Commission, or to Luther M. Walter, its Solicitor of Record, and to E. H. Young or Maco Stewart, His Solicitor of Record, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within

thirty days from the date hereof pursuant to the appeal sued out and filed in the Clerk's office in the United States Circuit Court for the Southern District of Texas at Galveston in the cause wherein Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company were complainants and the Interstate Commerce Commission and E. H. Young were defendants to show cause, if any there be, why the decree rendered against the said Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company as in said petition for appeal mentioned should not be corrected and why speedy justice should not be done in that behalf.

291 Witness the Honorable Melville W. Fuller Chief Justice United States this the 17th day of January in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Circuit Judges.

Service of copy of the within citation is hereby acknowledged this the 25 day of January, A. D. 1910.

LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission, Defendant.

Service of a copy of the within citation is hereby acknowledged this the 25 day of January, A. D. 1910.

MACO STEWART,
Solicitor for E. H. Young, Defendant.

(Endorsements:) No. 504. Eq. S. P. Terminal Company et al. Complainants, vs. Interstate Commerce Commission, et al., Defendants. Citation on Appeal. Filed Jan'y 29, 1910. C. Dart, Clerk.

292 *Citation on Appeal.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Citation on Appeal.

To the President of the United States to the Interstate Commerce Commission, or to Luther M. Walter, its Solicitor of Record, and to Southern Pacific Terminal Company, Southern Pacific Company, and the Galveston, Harrisburg & San Antonio Railway Company, or F. C. Dillard, Wm. F. Herrin, or Baker, Botts, Parker & Garwood, Their Solicitors of Record, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to the appeal sued out and filed in the Clerk's office in the United States Circuit Court for the Southern District of Texas at Galveston in the cause wherein Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company were complainants and the Interstate Commerce Commission and E. H. Young were defendants, to show cause, if any there be, why the decree rendered against the said E. H. Young as in said petition for appeal mentioned should not be corrected and why speedy
293 justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller Chief Justice of the United States this the 17th day of January in the year of our Lord, one thousand, nine hundred and ten.

[SEAL.]

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Circuit Judges.

Service of copy of the within citation is hereby acknowledged this the 25th day of January, A. D. 1910.

LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission, Defendant.

Service of copy of the within citation is hereby acknowledged this the 17 day of January, A. D. 1910.

F. C. DILLARD,
WM. F. HERRIN AND
BAKER, BOTTS,
PARKER AND GARWOOD,
Solicitors Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company.

(Endorsements:) No. 504. S. P. Terminal Co. et al., Complainants, vs. Interstate Commerce Commission et al., Defendants. Citation on Appeal. Filed Jan'y 29, 1910. C. Dart, Clerk.

294 *Appeal Bond.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Know all men by these presents: That we, Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company, as Principals and W. B. Chew and Oscar Wells as sureties, are held and firmly bound unto the Interstate Commerce Commission and E. H. Young in the full and just sum of Ten Thousand ($10,000.00) Dollars to be paid to the said Interstate Commerce Commission and E. H. Young, their certain attorneys, executors, administrators or assigns to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents this the 17th day of Jan'y, A. D. 1910.

Whereas, heretofore, towit on the 23d day of December, A. D. 1909, in a suit pending in the Circuit Court of the United States for the Southern District of Texas at Galveston and numbered 504 on the equity docket of said court between Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, Complainants and the Interstate Commerce Commission and E. H. Young, Defendants, and
295 between E. H. Young as cross-complainant and the Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company and the Interstate Commerce Commission as defendants to said cross-complaint an order, judgment and decree was rendered against the said Southern Pacific Terminal Company, Southern Pacific Company, Gal-

veston, Harrisburg & San Antonio Railway Company Complainants, and said E. H. Young, cross-complainant, that Complainants' original bill be dismissed and complainants taxed with the costs of said suit and that the cross-bill of said defendant E. H. Young be dismissed without prejudice and that he be taxed with the costs of such cross-complaint and the said complainants Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company having appealed from said order, judgment and decree to the Supreme Court of the United States and having obtained citation directed to the said Interstate Commerce Commission and the said E. H. Young citing and admonishing them and each of them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington within thirty days from the allowance of said appeal:

Now the condition of the above obligation is such that if the said Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company shall prosecute their said appeal to effect and shall pay all costs if they shall fail to make their said plea good, then the above obligation to be void; otherwise, to remain in full force and effect.

SOUTHERN PACIFIC TERMINAL COMPANY,
SOUTHERN PACIFIC COMPANY,
GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,
Principals,

By BAKER, BOTTS, PARKER AND GARWOOD, *Attorneys.*
W. B. CHEW, *Surety.*
OSCAR WELLS, *Surety.*

296 I, C. Dart, Clerk of the Circuit Court of the United States for the Southern District of Texas, do hereby certify that the above and foregoing is a good and sufficient bond for the amount therein specified and if presented to me for approval, that I will approve same.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court, So. Dist. Tex.,
By L. C. MASTERSON.

The above and foregoing bond approved and ordered filed this the 17 day of January, 1910.

DON A. PARDEE,
Circuit Judge.
A. P. McCORMICK,
Circuit Judge.
DAVID D. SHELBY,
Circuit Judge.

(Endorsements:) No. 504. S. P. Terminal Company et al., Complainants vs. Interstate Commerce Commission, et al., Defendants. Appeal Bond. Filed Jan'y 29, 1910. C. Dart, Clerk.

297 *Appeal Bond.*

In the United States Circuit Court for the Southern District of Texas.
In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Know all men by these presents: That I, E. H. Young, a- Principal, and American Surety Co., of N. Y., as surety are held and firmly bound unto the Interstate Commerce Commission, Southern Pacific Terminal Company, Southern Pacific Company and the Galveston, Harrisburg & San Antonio Railway Company in the full and just sum of Three Thousand ($3000.00) Dollars to be paid to the said Interstate Commerce Commission, Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, their certain attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally by these presents this January 17, 1910.

Whereas, that heretofore, to-wit, on December 23, 1909, in a suit pending in the Circuit Court of the United States for the Southern District of Texas at Galveston and numbered 504 on the equity docket of said Court between Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, complainants, and the Interstate Commerce Commission and E. H. Young, Defendants, and between E. H.
298 Young as cross-complainant and the Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company and the Interstate Commerce Commission as defendants to said cross-complain*ant* an order, judgment and decree was rendered against the said Southern Pacific Terminal Company, Southern Pacific Company, Galveston, Harrisburg & San Antonio Railway Company, Complainants, and said E. H. Young, cross-complainant, that Complainants' original bill be dismissed and complainants taxed with the costs of said suit and that the cross bill of said defendant E. H. Young be dismissed without prejudice and that he be taxed with the costs of such cross-complaint and the said defendant and cross-complainant E. H. Young having appealed from said order, judgment and decree to the Supreme Court of the United States and having obtained citation directed to the said Interstate Commerce Commission, and to the said Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company citing and admonishing them and each of them to be and appear at a session of the Supreme Court of the United States to be holden at the

City of Washington within thirty days from the allowance of said appeal;

Now the condition of the above obligation is such that if the said E. H. Young shall prosecute his said appeal to effect and shall pay all costs if he shall fail to make his said plea good, then the above obligation to be void; otherwise, to remain in full force and effect.

E. H. YOUNG,
[SEAL.] AMERICAN SURETY CO. OF N. Y.,
By MACO STEWART,
Vice President at Galveston.
MARION DOUGLAS,
Resident Ass't Sec'y.

299 I, C. Dart, Clerk of the Circuit Court of the United States for the Southern District of Texas at Galveston, do hereby certify that the above and foregoing is a good and sufficient bond for the amount therein specified and if presented to me for approval, that I will approve the same.

[SEAL.] C. DART,
Clerk Circuit Court United States for the Southern District of Texas, at Galveston.

The above and foregoing bond approved and ordered filed this the 17th day of January, 1910.

DON A. PARDEE,
Circuit Judge.
A. P. McCORMICK,
Circuit Judge.
DAVID D. SHELBY,
Circuit Judge.

300 *Extract from the Record Book of the Executive Committee of the American Surety Company of New York.*

"A meeting of the Executive Committee of the American Surety Company of New York, was held on the 1st day of June, 1909.

* * * * * * *

"The following resolution was adopted:

"Resolved, That Marion Douglas, of Galveston, Texas, be and he is hereby constituted and appointed a Resident Assistant Secretary of this Company at the town or city, aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be executed on behalf of this Company by one of its Resident Vice Presidents."

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 14th day of June, 1909.

[SEAL.]

H. A. REISS,
Assistant Secretary.

301 (Indorsements:) No. 504. S. P. Terminal Co., et al., Complainants, vs. Interstate Commerce Commission, et al., Defendants. Appeal Bond. Filed Jan'y 29, 1910. C. Dart, Clerk.

302 In the Circuit Court of the United States for the Southern District of Texas, at Galveston.

I, C. Dart, Clerk of the Circuit Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record, assignment of errors, and all proceedings in the case, in Cause No. 504 on the Chancery Docket of said Court, entitled Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company, Complainants, vs. Interstate Commerce Commission, and E. H. Young, Defendants, as the same now appears on file and of record in my office.

To certify which, witness my hand and the seal of said Court, at Galveston, in said District, this the 5th day of February, A. D. 1910.

[Seal United States Circuit Court, Southern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, Southern District of Texas.

[Endorsed:] No. 504, Equity. United States Circuit Court, Southern District of Texas. Southern Pacific Terminal Company, et al., vs. Interstate Commerce Commission, et al. Copy of the record, assignment of errors, and all proceedings in the case.

303 In the United States Circuit Court for the Southern District of Texas. In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Citation on Appeal.

To The President of the United States to the Interstate Commerce Commission, or to Luther M. Walter, its Solicitor of Record, and to E. H. Young or Maco Stewart, His Solicitor of Record, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to the appeal sued out and filed in the Clerk's office in the United States Circuit Court for the Southern District of Texas at Galveston in the cause wherein Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company were complainants and the Interstate Commerce Commission and E. H. Young were defendants to show cause, if any there be, why the decree rendered against the said Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company as in said petition for appeal mentioned should not be corrected and why speedy justice should not be done in that behalf.

304 Witness the Honorable Melville W. Fuller, Chief Justice United States this the 17 day of January in the year of our Lord, one thousand, nine hundred and ten.

[Seal United States Circuit Court, Southern District of Texas.]

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Circuit Judges.

Service of copy of the within citation is hereby acknowledged this the 25 day of January, A. D. 1910.

LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission, Defendant.

Service of a copy of the within citation is hereby acknowledged this the 25 day of January, A. D. 1910.

MACO STEWART,
Solicitor for E. H. Young, Defendant.

305 [Endorsed:] No. 504. Eq. S. P. Terminal Company, et al., Complainants, vs. Interstate Commerce Commission, et al., Defendants. Citation on Appeal. Filed Jan'y 29th, 1910, C. Dart, Clerk.

306 In the United States Circuit Court for the Southern District of Texas. In Equity.

No. 504.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, and Galveston, Harrisburg & San Antonio Railway Company, Complainants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG, Defendants.

Citation on Appeal.

To The President of the United States to the Interstate Commerce Commission, or to Luther M. Walter, its Solicitor of Record, and to Southern Pacific Terminal Company, Southern Pacific Company, and the Galveston, Harrisburg & San Antonio Railway Company, or F. C. Dillard, Wm. F. Herrin, or Baker, Botts, Parker & Garwood, Their Solicitors of Record, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to the appeal sued out and filed in the Clerk's office in the United States Circuit Court for the Southern District of Texas at Galveston in the cause wherein Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company were complainants and the Interstate Commerce Commission and E. H. Young were defendants to show cause, if any there be, why the decree rendered against the said E. H. Young as in said petition for appeal mentioned should not be corrected and why speedy justice should not be done in that behalf.

307 Witness the Honorable Melville W. Fuller, Chief Justice of the United States this the 17 day of January in the year of our Lord, one thousand, nine hundred and ten.

[Seal United States Circuit Court, Southern District of Texas.]

DON A. PARDEE,
A. P. McCORMICK,
DAVID D. SHELBY,
Circuit Judges.

Service of copy of the within citation is hereby acknowledged this the 25 day of January, A. D. 1910.

LUTHER M. WALTER,
Solicitor for Interstate Commerce Commission, Defendant.

Service of copy of the within citation is hereby acknowledged this the 17 day of January, A. D. 1910.

F. C. DILLARD,
WM. F. HERRIN AND
BAKER, BOTTS, PARKER & GARWOOD.
Solicitors Southern Pacific Terminal Company, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company.

308 [Endorsed:] No. 504. S. P. Terminal Co., et al., Complainants, vs. Interstate Commerce Commission, et al., Defendants. Citation on appeal. Filed Jan'y 29, 1910. C. Dart, clerk.

309 In the Supreme Court of the United States, October Term, 1909.

Nos. 821, 822.

SOUTHERN PACIFIC TERMINAL COMPANY et al., Appellants,
v.
THE INTERSTATE COMMERCE COMMISSION et al.

E. H. YOUNG, Appellant,
v.
THE INTERSTATE COMMERCE COMMISSION et al.

Stipulation.

It is hereby stipulated by counsel for the parties to the above entitled cause that in the printing of the transcript of the record therein the large map showing wharves, piers, etc., attached thereto, may be omitted by the clerk, with the right, however, on the part of the Court or counsel to refer to the same; and the right further of counsel on either side, not less than twenty days before the hearing of the case, if either side deems it material, to require the printing thereof as a part of the record.

LLOYD W. BOWERS,
Solicitor General.
MAXWELL EVARTS,
Counsel for Appellants.

March 12, 1910.

310 [Endorsed:] File Nos. 22,047 and 22,048. Supreme Court U. S. October Term, 1909. Term Nos. 821 and 822. Southern Pacific Terminal Co. et al., Appellants, vs. The Interstate

Commerce Commission et al., E. H. Young, Appellant, vs. The Interstate Commerce Commission et al. Stipulation to omit map in printing of record. Filed March 14, 1910.

Endorsed on cover: File No. 22,047. S. Texas C. C. U. S. Term No. 821. Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company, appellants, vs. The Interstate Commerce Commission and E. H. Young. File No. 22,048. Term No. 822. E. H. Young, appellant, vs. The Interstate Commerce Commission, Southern Pacific Terminal Company et al. Filed March 3d, 1910. File No. 22,047 and 22,048.

Supreme Court of the United

OCTOBER TERM, 1926

No. 459

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY and GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,

Appellants,

vs.

INTERSTATE COMMERCE COMMISSION and S. H. YOUNG,

Appellees.

No. 460

S. H. YOUNG,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY et al.,

Appellees.

MOTION TO ADVANCE

MAXWELL EVARTS,

Of Counsel for Appellants.

C. C. Shortstown, Jr. Co. 20 Lighting Street, New York.

Supreme Court of the United States.

OCTOBER TERM 1909.

No. 821.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY and GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,

Appellants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG,

Appellees.

No. 822.

E. H. YOUNG,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY, ET AL.,

Appellees.

Appeals from the Circuit Court of the United States for the Southern District of Texas.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

This suit was institnted by the Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company against the Interstate Commerce Commission and E. H. Young (Young being joined as a nominal defendant only) to enjoin the enforcement of an order of the Interstate Commerce Commission. The defendant Young admitted the allegations of the bill and filed a cross-bill praying the same relief. The Circuit Court denied a motion for preliminary injunction (Rec., p. 54) and on December 23, 1909, made its final decree after hearing on the merits dismissing the bill of complaint and cross-bill (p. 205), Judges McCormick and Shelby concurring in that action and Judge Pardee dissenting therefrom. No. 821 is the appeal of the original complainants in the suit from the dismissal of their bill. No. 822 is the appeal of the defendant Young from the dismissal of his cross-bill.

The order of the Commission (p. 19) directed

the corporation appellants to cease and desist on or before the first day of September, 1908, and thereafter to abstain from granting and giving to appellant Young the undue preferences and advantages which accrued to said Young through the failure of the corporation appellants to exact from him payments of wharfage charges for the handling of cotton seed products over the wharves of the appellant Southern Pacific Terminal Company at Galveston while exacting such wharfage charges from other shippers, and further prohibiting the allowance to said Young of space on said wharves for his exclusive use in the storage and handling of cotton seed products.

The appellant Southern Pacific Terminal Company, a Texas corporation, owns title in fee simple to certain water front property in Galveston and maintains thereon two wharves, designated as A and B, as public wharves. The appellant Galveston, Harrisburg & San Antonio Railway Company, a Texas corporation, has track connections with the tracks located on the wharves of the Terminal Company by which cars transported over its lines as well as those transported over the lines of other railroads entering Galveston are switched to and from the said wharf tracks. The appellant Southern Pa-

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

This suit was institnted by the Southern Pacific Terminal Company, Southern Pacific Company and Galveston, Harrisburg & San Antonio Railway Company against the Interstate Commerce Commission and E. H. Young (Young being joined as a nominal defendant only) to enjoin the enforcement of an order of the Interstate Commerce Commission. The defendant Young admitted the allegations of the bill and filed a cross-bill praying the same relief. The Circuit Court denied a motion for preliminary injunction (Rec., p. 54) and on December 23, 1909, made its final decree after hearing on the merits dismissing the bill of complaint and cross-bill (p. 205), Judges McCORMICK and SHELBY concurring in that action and Judge PARDEE dissenting therefrom. No. 821 is the appeal of the original complainants in the suit from the dismissal of their bill. No. 822 is the appeal of the defendant Young from the dismissal of his cross-bill.

The order of the Commission (p. 19) directed

the corporation appellants to cease and desist on or before the first day of September, 1908, and thereafter to abstain from granting and giving to appellant Young the undue preferences and advantages which accrued to said Young through the failure of the corporation appellants to exact from him payments of wharfage charges for the handling of cotton seed products over the wharves of the appellant Southern Pacific Terminal Company at Galveston while exacting such wharfage charges from other shippers, and further prohibiting the allowance to said Young of space on said wharves for his exclusive use in the storage and handling of cotton seed products.

The appellant Southern Pacific Terminal Company, a Texas corporation, owns title in fee simple to certain water front property in Galveston and maintains thereon two wharves, designated as A and B, as public wharves. The appellant Galveston, Harrisburg & San Antonio Railway Company, a Texas corporation, has track connections with the tracks located on the wharves of the Terminal Company by which cars transported over its lines as well as those transported over the lines of other railroads entering Galveston are switched to and from the said wharf tracks. The appellant Southern Pa-

cific Company, a Kentucky corporation, owns a majority of the stock of both the Galveston, Harrisburg & San Antonio Railway Company and the Southern Pacific Terminal Company and owns and operates a line of steamships between New York and Galveston which generally berth at the said wharves of the Terminal Company. The Terminal Company owns no rolling stock, does none of the switching to or from its wharves and issues no bills of lading. It publishes but has never filed with the Interstate Commerce Commission a schedule of wharfage charges which it imposes upon all freight passing over its said wharves. In 1906 the appellant Terminal Company entered into a contract with the appellant Young whereunder it erected at an expense of $65,000. a pier and warehouse on a part of its land adjacent to Pier B which land was then lying idle and unimproved and was not required for the business of the Terminal Company and whereby the Terminal Company leased said land and said improvements to said Young at an annual rental of $15,000., Young having exclusive possession and control thereof. Young installed thereon at an expense of some $50,000. machinery and equipment for the conduct of his business of grinding, sacking

and exporting cotton seed meal. Young purchases cotton seed cake and meal chiefly in the State of Texas which is shipped to him on bills of lading showing Galveston as the destination. When it reaches Galveston it is unloaded by his own men at said leased pier. The cake is then ground into meal and the meal thus ground together with meal bought outside of Galveston is sacked and loaded upon ships berthing at said pier for export to foreign purchasers, Young taking ship's bill of lading to his own order. Young pays to the Terminal Company no wharfage charges and no other compensation than the annual rental stipulated in the lease (Agreed Statement of Facts, Rec., pp. 100 to 136 inclusive).

The Interstate Commerce Commission held that the grant of exclusive wharf privileges and facilities and the freedom from regular wharfage charges resulting from this lease constituted an unlawful preference and advantage to Young to the prejudice of other shippers in violation of Section 3 of the Commerce Act.

II.

The principal questions involved in these appeals are:

1. Whether the Interstate Commerce Commission had jurisdiction to annul the lease by by the Terminal Company to Young of property never used or required by it for its public wharf business.

2. Whether jurisdiction is conferred on the Interstate Commerce Commission to regulate the sale or other disposition by any corporation of its real property not devoted to a public use.

3. Whether the Southern Pacific Terminal Company by reason of its ownership of public wharves, although conducting no transportation and issuing no bills of lading, is a common carrier within the meaning of Section 3 of the Act to Regulate Commerce.

4. Whether (assuming the Southern Pacific Terminal Company to be a common carrier) the leasing of a part of its idle property to a shipper for a private wharf constitutes an undue or unreasonable preference or advantage to such shipper.

5. Whether the leasing of such exclusive facilities (assuming it to constitute an undue

or unreasonable preference and advantage) pertaining as it does exclusively to Young's foreign export business from the Port of Galveston constitutes a practice which the Interstate Commerce Commission has jurisdiction to regulate.

III.

The questions involved in these appeals are of great public importance. They concern the limitations of the power conferred upon the Interstate Commerce Commission. It is in the interest of the public generally and of those engaged in the transportation business of the country especially that a final judicial determination of the right of the Commission to exercise the powers which it has actually exercised should be obtained.

The Attorney General for the purposes of the hearing in the Court below certified that in his opinion this suit is a case of general public importance and accordingly requested and secured its expedition under the Act of February 11, 1903. The suit has not become of any less importance to the public by reason of the divided decision of the Court below in favor of the Interstate Commerce Commission.

These appeals are entitled as a matter of right to a preference under the provisions of Section 16 of the Act to Regulate Commerce as amended by Section 5 of the Act of June 29, 1906 (34 Stats., 590), making applicable to suits to enjoin the orders of the Interstate Commerce Commission the provisions of the Expedition Act of February 11, 1903 (32 Stats., 823). Section 16 as amended provides that "it shall be the duty of the Attorney General in every such case to file the certificate provided for in said Expediting Act of February 11, 1903, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States the case shall have in such Court priority in hearing and determination over all other causes except criminal causes."

WHEREFORE the appellants pray this Honorable Court that these appeals may be advanced upon the docket and heard at as early a day in the October, 1910, Term as may be convenient to the Court.

Dated May 7, 1910.

Respectfully submitted,

MAXWELL EVARTS,

Of Counsel for Appellants.

NOTICE OF MOTION.

Please take notice that the foregoing motion to advance will be submitted to the Supreme Court of the United States on Monday, the 16th day of May, 1910, at the opening of the Court on that day or as soon thereafter as counsel can be heard.

Dated May 7, 1910.

MAXWELL EVARTS,
Of Counsel for Appellants.

To HONORABLE GEORGE W. WICKERSHAM,
Attorney General of the United States.
HONORABLE LLOYD W. BOWERS,
Solicitor General of the United States.

White Supreme Court, U. S.
OCT. TERM, 1910.
NOV 28 1910
JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 459.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY and GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY,
Appellants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

No. 460.

E. H. YOUNG,
Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

NOTES OF ARGUMENT FOR THE APPELLANTS.

MAXWELL EVARTS,
Counsel for Appellants.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 459.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY and GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY,

Appellants,

vs.

INTERSTATE COMMERCE COMMISSION and E. H. YOUNG.

No. 460.

E. H. YOUNG,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY, ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

NOTES OF ARGUMENT FOR THE APPELLANTS.

Statement.

Before the appellant Young made his contract with the Southern Pacific Terminal Company,

which, according to the Interstate Commerce Commission, gives him a preference in violation of the third section of the Interstate Commerce Act, it was the custom of those engaged in exporting cotton-seed meal to grind the cotton-seed cake at the producing points, sack it, and send it to the port of export (Record, p. 132). Young was the first to see that much could be saved in the handling of the cotton-seed and in other ways if the cotton-seed cake was sent in bulk to the port of export, there ground into cotton-seed meal and loaded from the plant where the grinding was done direct into ships-hold.

The Southern Pacific Terminal Company, which was not a common carrier, but a Texas corporation created for the purpose of holding and leasing real estate, owned a bulkhead on the Galveston water front, which was lying idle and unused in any way. Young told the Terminal Company that if it would build a platform and shed upon the bulkhead he would rent the bulkhead for the purpose of grinding cotton-seed cake for export trade. The Terminal Company built the platform and shed, which with the bulkhead, cost $65,000 (Record, p. 131). Young rented it, paid therefor the substantial rent of $15,000 a

year and established thereon his milling plant at a cost of $50,000 (Record, p. 132).

The Southern Pacific Terminal Company owned other property on the water-front at Galveston which was lying idle and which it was ready and willing to rent to any other cotton-seed meal exporter upon the same terms that it made with Young (Record, p. 86). In addition to the property of the Terminal Company there was at least a mile of water frontage at Galveston which was available to other exporters (Record, p. 129).

The venture of Young proved very successful, and as a result of his intelligent and economical way of doing business he was able to pay more to the producers of cotton-seed cake than his competitors and was able to sell cotton-seed meal to his European purchasers at less than the other exporters of cotton-seed meal and still make a reasonable profit (Record, p. 133).

A close reading of the record seems to show that whatever preference Young had was simply the preference which every wise and intelligent business man who adopts new and economical methods has over his competitors who do not choose to do so. Such a preference was not in-

tended to be covered by the Interstate Commerce Act, and it is impossible to consider the facts in this case without recalling the words of Mr. Justice BREWER in *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S., 79, 104, where he says:

> "Is it true in this country that one who by his attention to business, by his efforts to satisfy customers, by his sagacity in discerning the probable courses of trade, and by contributing of his means to bring trade into those lines, succeeds in building up a large and profitable business, becomes thereby a legitimate object of the legislative scalping knife?"

The contract between Young and the Terminal Company continued until one Carl Eichenberg, a competitor of Young, on September 11, 1907, filed a petition with the Interstate Commerce Commission against the Southern Pacific Company and the Southern Pacific Terminal Company complaining that the arrangement it had with Young gave the latter an undue and unreasonable advantage and preference over his competitors. It is important to notice that the Galveston, Harrisburg and San Antonio Railway

Company was not made a party to this petition by Eichenberg, but was made a party upon the motion of the Interstate Commerce Commission itself (Record, pp. 68, 69).

The proceeding was tried before the Interstate Commerce Commission and resulted in a report holding that Young by reason of his lease of the pier of the Terminal Company had been given a preference in violation of the third section of the Interstate Commerce Act, and an order was entered by the Commission on June 24, 1908, requiring the Southern Pacific Company, the Southern Pacific Terminal Company and the Galveston, Harrisburg and San Antonio Railway Company to cease and desist on September 1, 1908, and for a period of two years thereafter, from giving to Young the undue preference and advantage which accrued to him by virtue of his contract with the Terminal Company (Record, p. 19).

A bill was filed in the United States Circuit Court for the Southern District of Texas by the Terminal Company and others to enjoin the Interstate Commerce Commission from enforcing this order.

The case was heard before three Judges under

the provisions of the Expedition Act and the bill was dismissed by a divided court, without opinion (Record, p. 205). From the decree dismissing the bill, this appeal was taken; and the questions involved are whether the Interstate Commerce Commission has jurisdiction;

FIRST. To pass upon the title to real estate.

SECOND. To entertain a proceeding against a corporation which is not a common carrier.

THIRD. Over strictly intra-state business.

FOURTH. Over a preference which, if it exists at all, necessarily relates to transportation on the high seas and without the jurisdiction of the United States.

FIRST POINT.

The Interstate Commerce Commission has no power to pass upon the title to real estate.

In its answer to the bill of complaint in this case, the Interstate Commerce Commission described itself as "a bureau or department of

the government of the United States which was created and established and now exists under and by virtue of an act of the Congress of the United States entitled 'An act to regulate commerce,'" and amendments thereto (Record, p. 65). It is an administrative body. Its powers and jurisdiction are limited by the provisions of the act which created it and there is nothing in said act which authorizes the Commission to pass upon the question of the title to the property of the Southern Pacific Terminal Company.

An examination of the record shows beyond the possibility of dispute that the Southern Pacific Terminal Company acquired from the heirs of C. P. Huntington a title in fee simple to the property leased to Young; that C. P. Huntington acquired a fee simple title to the property from the Galveston City Company, which in turn acquired its title in fee simple from M. B. Menard; and that Menard obtained a title in fee simple from Juan N. Seguin, who obtained the Spanish title thereto from the State of Coahuila and Texas, and, in addition, on January 25, 1838, obtained a patent therefor from the State of Texas. All of this

appears plainly from the agreed statement of facts in this case (Record, pp. 107–127).

The deed of this property to C. P. Huntington was dated January 25, 1899. The city of Galveston claimed to have an easement to open certain streets on this water-front property subsequently acquired by the Southern Pacific Terminal Company. This easement was abandoned and surrendered by an ordinance of the city of Galveston, passed February 4, 1899. This ordinance was afterwards confirmed by an act of the Legislature of Texas, passed May 1, 1899. The abandonment of this easement by the city of Galveston was based upon the performance of certain conditions by C. P. Huntington. The title to the property which Huntington had purchased from the Galveston City Company was, of course, unaffected by this ordinance, except as to the right of the city of Galveston to open streets thereon.

Every condition required by this ordinance was fulfilled by Huntington (Record, p. 127). Even if Huntington had not performed the conditions required by the ordinance, unquestionably the city of Galveston or the State of Texas

would alone have been in a position to take advantage of this failure.

Notwithstanding the clear title of the Terminal Company to this property, and in spite of the fact that Huntington complied with every condition required by the ordinance, the Interstate Commerce Commission, being an administrative body only, held that the Southern Pacific Terminal Company did not hold title in fee simple to the property in question, and had no right to make the lease to Young (Record, p. 93).

Of course the character of the title of the Terminal Company to the land leased to Young can in no way affect the question of whether Young obtained a preference by reason of the lease. The violation by Young of the Interstate Commerce Act (if there is one) exists whether the Terminal Company's title to the property leased is in fee or otherwise.

It is needless to point out the extraordinary position in which the Terminal Company is placed by a decision of an administrative body construing the title to its entire water front in the City of Galveston, and holding that it has merely a conditional title thereto, instead of a fee simple as all the courts of Texas have held.

We respectfully submit that this decision, holding that the Terminal Company did not have a title in fee simple to this property, was beyond the jurisdiction of the Commission, and that, if the Interstate Commerce Commission had the power to pass upon this question of title, the decision was wrong.

SECOND POINT.

The Southern Pacific Terminal Company is not a corporation within the jurisdiction of the Interstate Commerce Commission.

The Terminal Company as its name implies is not in any way engaged in transportation, but is a real estate company organized under the laws of the State of Texas for the purpose of constructing, buying, leasing, owning, maintaining, operating and conducting warehouses, docks and wharves and grain elevators, etc. (Record, p. 100).

The Interstate Commeree Act in its opening paragraph defines the corporations subject to the

act, and provides that it shall be applicable only to corporations engaged in transportation.

Whether a corporation is a carrier or not is determined by its charter powers and by what it does and not by the character or business of the holder and the owner of its capital stock. Whether the Terminal Company does business as a transportation company cannot be determined one way or the other or in any way be affected by the fact that the Southern Pacific Company, a corporation of Kentucky, owns its capital stock and at the same time owns the capital stock of the Galveston, Harrisburg and San Antonio Railway Company. To so hold would subject to the provisions of the Interstate Commerce Act persons and corporations in no way included or intended to be included within its provisions.

THIRD POINT.

The shipment of the cotton-seed cake from interior Texas points to Galveston was on local bills of lading, and was, therefore, not within the jurisdiction of the Interstate Commerce Commission.

It is true that a very small proportion of the cotton-seed cake was shipped to Young from points in Oklahoma and Indian Territory to Galveston, but such shipments were all on local bills of lading, and not on export bills of lading from points of origin to foreign destination. The bulk of the shipments were, however, from interior points of Texas to Galveston, consigned on local bills of lading to Young. The shipments from points outside of Texas are so insignificant that they need not be considered. If, therefore, there was any preference given to Young with reference to such shipment from the interior points of Texas to Galveston, it must necessarily be a preference with regard to intra-state commerce, and, therefore, nothing over which the Interstate Commerce Commission has any jurisdiction. But if we rightly understand the opinion of the Interstate Commerce

Commission, it is not claimed that the preference accruing to Young was with reference in any way to the transportation of the cotton-seed cake from points of origin to Galveston. There was in such shipment no discrimination in his favor. The shipments of cotton-seed cake were carried for Young on the same terms and conditions as they were carried for all other shippers. They came under local bills of lading, and were subject in every way to the jurisdiction and protection of the Texas Railroad Commission. It is, therefore, apparent that up to the delivery of the cotton-seed cake at Galveston to Young, which terminated absolutely the transportation of the cotton-seed cake in the United States, there was no preference given to him in any way over any of his competitors.

FOURTH POINT.

If Young acquired any preference by reason of his contract with the Terminal Company it was entirely a preference with reference to export business, that is to say, a preference with reference to the shipment of cotton seed meal from the Galveston pier to foreign ports, which is clearly not a preferenee intended to be covered by the third section of the Interstate Commerce Act and therefore not within the jurisdiction of the Interstate Commerce Commission.

We insist that Young had no preference of any kind in this case either within the jurisdiction of the Interstate Commerce Commission or otherwise beyond the preference and advantage which every business man who conducts his business on intelligent and economical principles has over his competitors, who do not exercise the same judgment and intelligence. We insist that it was open to every exporter of cotton seed meal in Texas, or in the United States, to grind and sack cotton seed cake at the wharf and deliver it into ships-hold directly from the mills. It is true that this was a departure from the

ordinary custom, but the departure was based upon the sound business principle of minimizing the handling of the product, and cannot be deemed to be in any true sense of the word, a preference created by the right given by the Terminal Company to Young. This right to grind cotton-seed cake at the water-front was open to any other exporter, who could have obtained similar privileges from the Terminal Company (Record, p. 86), or could have rented any part of the available frontage owned in Galveston by persons other than the Terminal Company (Record, p. 129).

Assuming however that a preference resulting from business sagacity and foresight is a preference condemned by the third section of the Interstate Commerce Act, yet the preference in this case related in no way to transportation within the United States, but only to transportation on the high seas, in ships chartered by Young.

That this preference began after the transportation in the United States had been terminated and the cotton-seed cake delivered to Young at his plant in Galveston for grinding into cotton seed meal is apparent from

the report of the Interstate Commerce Commission made by Commissioner Knapp. At page 86 of the record he says;

> " Young testified that he has the following advantages over any exporter of cotton-seed products from the port of Galveston because of the large capital he employs, his methods of doing business, and the facilities he has on the docks of the Terminal Company:
>
> " Say that I receive an order to-day for a cargo of cake from Denmark. I cable my friends that I am working on their order and will wire. I cable my agent in London to offer me a steamer of suitable size and position due thirty or sixty days hence. I receive an offer which carries with it a commission for agent's or charterer's fee for chartering steamer. I make a counter bid on the steamer and close it. I receive in that instance the charterer's commission. I bring that steamer forward, accept the order, and proceed to buy the goods. When the steamer arrives, she is berthed at the dock, and I proceed to load her in the capacity of stevedore, and I proceed to unload the cars in the capacity of a contractor. I proceed to sack and bag the cake in the capacity of a manufacturer, and for all those offices

which I perform I endeavor to make a profit and usually do. I consider that in chartering there is probably a commission on the steamer with the perquisites that go with chartering, including the dispatch in quick loading, for loading and discharging steamers, and the profits on chartering, stevedoring, unloading, grinding, sacking, etc., which is in addition to a merchant's buying and selling profit. I consider there is usually a fair margin there of between 30 and 40 cents per ton, more or less, as the occasion may be, which is amply sufficient to justify a man to do business, and this is exclusive of and in addition to the usual profit on the business."

It is clear from the foregoing that whatever preference or advantage Young has over his competitors is due to the fact that he grinds his cotton-seed cake at the water-front and delivers direct to steamers chartered by him, thus saving the expense of handling and enabling him to make an additional small profit by being in a position to charter his own ships. In other words his preference results from the use of sound business judgment in reference to transportation from the port of Galveston to foreign countries.

It is true that the Commission states "that Young is exempt from demurrage charges which accrue after the product remains ten days in the cars" (Record, p. 87). But there is no evidence whatever in support of this proposition, and, as we understand it, it is not so. Young is exempt from demurrage charges simply because he unloads his cars within the time required, and is consequently exempt just as every other consignee is exempt from demurrage charges when he unloads the cars consigned to him within the required time limit.

We, therefore, respectfully submit that this preference is nothing more than the advantage which every man of good business judgment has over a competitor who does not exercise the same good judgment, and that, if anything more than this, it certainly is not a preference over which the Interstate Commerce Commission has jurisdiction, for the reason that whatever preference results to Young from his lease of the Terminal Company's property is a preference which has wholly to do with the transportation of the cotton-seed meal on the high seas, and is without and beyond the jurisdiction of the Interstate Commerce Commission.

FIFTH POINT.

The expiration of the order of the Commission before the argument of this case does not require the dismissal of this case upon the ground that it has become a moot question

The order of the Commission of June 24, 1908, expired by its own terms on September 1, 1910, and it may be claimed by the government that this case should be dismissed for the reason that it is now only an abstract proposition because the order sought to be enjoined is no longer effective.

It is a well-established principle adopted by courts for their own protection that upon the happening of any event pending a litigation which would render a decree ineffectual the case must be dismissed as presenting only a moot question.

Of course this rule is but the exercise of a wise discretion and our investigation indicates that the rule has usually been enforced in private litigation and not in suits brought in reference to governmental questions the disposition of which affects, not simply the individuals in-

volved, but the whole policy of an administrative branch of the government.

The general principle which we do not dispute and which has usually been applied only in cases between private litigants for the protection of the courts, is stated by Mr. Justice GRAY in *Mills vs. Green*, 159 U. S., 651, 653, as follows:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

We insist, however, that the present case presents an exception to the general rule and that

no court is deprived of authority to hear a so-called moot question and deal with the situation as it was when the controversy arose, if the ends of justice require it. In other words, the rule as to moot questions is elastic and one which appeals to the discretion of the courts and can be enforced or not enforced, as the circumstances of each case may require. This is clear from the opinion of Mr. Justice GRAY in the *Mills case* (*supra*) where he says at page 654 :

> " If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, *whenever in its opinion justice requires it*, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages."

An instructive case upon this question is the contested election case of *Kindel vs. LeBert*, 23 Colo., 385. The parties were opposing candidates for the office of County Clerk. Upon the face of the returns, LeBert was declared elected,

whereupon Kindel, alleging fraud, instituted a proceeding to have LeBert's election declared void. Upon the trial, the petitioner asked permission to file an amended pleading, which it was found set up new matter. The Court denied the application and proceeded with the trial, which resulted in LeBert retaining office, and the contestor took an appeal to the Supreme Court of the State. Thereafter, and before the hearing of the appeal, it was found that as no provision had been made for the preservation of the ballots, the same were destroyed under statutory authority, and the contestor conceded that this destruction eliminated from the case all question of fraud, so that even in the event of a reversal, he would be obliged to abandon his contest, thus rendering ineffectual any judgment that might be entered in the case. It was open to the court to dismiss the case as a moot case or to exercise its discretion and pass upon the questions involved. Because of the public interests involved, the court took the latter course, and upon this question of discretion said at page 399:

> " We may also add that, under the authority of *Mills v. Green*, 159 U. S., 651,

we might properly have declined to pass upon any of the controverted questions and dismissed the appeal because of the happening of the event which rendered action by this court a useless proceeding, so far as the contestor is concerned. But, considering the public interests involved, it has been deemed best to settle these questions, in order that the legislature, now in session, may, if it sees fit, provide a different procedure from that now existing."

In the *Matter of Cuddeback*, 3 App. Div., 103, it was said at p. 108:

"It is urged that because the election has passed, this appeal should not be decided on the merits, but should be dismissed upon the ground that the question is no longer a practical one. It is difficult to extract from the reported cases in this State a definite rule as to when an action or proceeding should be dismissed because the question involved has ceased to be a practical one.

* * * * *

In *People ex rel., Press Pub. Co. v. Martin* (72 Hun, 354; aff'd. 142 N. Y., 228), a determination was reviewed upon *certiorari*, though the time had passed when relief could be granted. It was said in that case:

> " 'While the time has long since passed when any decision in this matter can have any practical, efficient operation, we will in view of the public importance of the questions involved, overlook that circumstance and proceed to the determination of the matter upon its merits upon the facts as they appear in this record.'
>
> * * * * *
>
> "Whether courts will decide a case involving a question which has ceased to be of practical interest to the parties seems to depend upon whether the question involved is one of public importance."

In the case of *People ex rel. Borgia vs. Doe*, 109 App. Div., 670, 671, the court held that:

> "The question presented is of so much importance that, we think, it should be considered and determined upon the merits (*Matter of Fairchild*, 151 N. Y., 359) notwithstanding such determination can, so far as the relator is concerned (the election having passed), accomplish no purpose except to prevent others being similarly deprived of their right to vote."

In *Matter of Madden*, 148 N. Y., 136, 139, the Court said:

> "The election having been held, the decision of the question is of no practical importance in the particular case. But the courts in the first and second departments have reached opposite conclusions upon the question, and a final decision seems to be required to prevent embarassment in the future from conflicting judicial decisions."

In *Matter of Fairchild*, 151 N. Y., 359, 361, the Court said:

> "The respondent contends that inasmuch as the election has been held, the decision of the questions presented on this appeal is of no importance, as it can, at most, only affect the question of costs. We think the questions involved are of sufficient importance to require their determination by this court, as it may prevent future embarrassment in the congressional district to which this controversy relates, and also settle other questions upon which there is a conflict in the decisions of the Supreme Court."

In *Boise City Irrigation and Land Co. vs. Clark, et al. County Commrs.*, 131 Fed. Rep., 415, it was held that,

> "a decree affirming an order of a municipal body fixing maximum rates to be charged by

an irrigation company for water furnished consumers during a certain year, may be reviewed on appeal, although the year has expired, where, under the statute, such rate continues until changed or where some question of law is involved, the decision of which may affect the future action of the authorities" (Syllabus).

and at page 416 the Court said:

"The appellant is a New Jersey corporation, and brought the present suit in the court below against the County Commissioners of Ada County, Idaho, sitting as a board of water commissioners, to obtain a decree annulling an order made by the Commission fixing a maximum rate to be charged by the complainant for water delivered from its canal system to consumers thereof for the irrigating season of the year 1901. * * * It insists that the rate as so fixed is too low to admit of just compensation for the services rendered, and indeed, amounts to a practical confiscation of defendant's property, contrary to the provisions of the Constitution of the United States. * * * It is contended on the part of the appellees that, as the period for which the rate in question was fixed has expired, the case has

> become but little, if any, more than a moot case, but the courts have entertained and decided such cases heretofore partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."

Now, the question comes to this: Are the facts in the present case such as to warrant the court in departing from the general rule and holding that it should "deal with the rights of the parties as they stood at the commencement of the suit?"

We say that the facts in this controversy make such a presentation to this court that to dismiss this appeal on the ground that since it was taken the controversy has become a moot question, would be a substantial denial of justice.

The Terminal Company owned in fee property on Galveston Bay, which it had a right to lease. It did lease this property for five years for the substantial figure of $15,000 a year. The lessee

established upon the property, at a cost of $50,000, a plant for grinding cotton seed. This cotton seed, purchased for the most part in Texas, was, when ground into meal, shipped direct to foreign ports on ships loaded alongside of the lessee's plant.

Upon the complaint of a competitor, the Interstate Commerce Commission, an administrative branch of the Federal Government, has undertaken in a more or less informal proceeding to pass upon the question of the title to real estate owned by the Terminal Company, to pass upon the question of the Terminal Company's right to lease property owned by it, and to break up the business of its lessee upon the theory that it had jurisdiction of a shipment on the high seas from a Texas port to a foreign port, when the shipment of cotton seed meal after it was ground in the plant of the lessee from the Terminal Company was never handled by a carrier within the United States.

The ground of the decision of the Interstate Commerce Commission was that the leasing of property for which it had no use by the Terminal Company to Young gave to the latter a preference, although it was not pointed out how the

business foresight which knew enough to grind cotton-seed for export at the water side could possibly be deemed the obtaining a preference with regard to transportation in the United States, over which alone the Interstate Commerce Commission has jurisdiction. The only possible preference which Young had over any competitor was that he ground cotton-seed at the water's edge and loaded the meal from his grinding mills into the holds of the steamers which came alongside his mill. This preference (if it was a preference) was due to business sagacity alone, and in any event had to do only with foreign transportations and was, therefore, not in any way a violation of the Interstate Commerce Act.

Let us consider the situation if this case is dismissed for the reason that it presents only a moot question. The law provides that the orders of the Commission shall remain in force for two years. Before the order in the present case went into effect this case was begun to enjoin its enforcement. Every possible effort to expedite this case has been made by the appellants, and it is now heard at this early date because of the granting of the motion to advance it

made by them and not by the government as is usual in cases of this character.

Now, if this case is dismissed without passing upon the questions involved, and the Terminal Company should renew its lease with Young, it would then be met in any proceeding brought by Young's competitor Eichenberg before the Interstate Commerce Commission with the claim that the questions were already *res adjudicata* by reason of the former proceeding, and no longer open to discussion, and long before any hearing could be had in this court upon any order entered by the Commission, the two-year limit would again expire, and again the claim be made that this case had become a moot case.

That the judgment in this case would be regarded as final in any subsequent proceeding between the parties is clear. This Court, in *Johnson Company vs. Wharton*, 152 U. S., 252, in an opinion by Mr. Justice HARLAN, held that a defeated litigant in a case which by reason of the amount involved was not appealable to the highest court, could not in a subsequent litigation between the same parties, which by reason of the amount involved was appealable to the highest court, re-litigate the question determined

in the first suit, but was bound on the principle of *res adjudicata* by the judgment in the first case. At page 256 it was said:

> "Is it true that a defeated suitor in a court of general jurisdiction is at liberty, in a subsequent suit between himself and his adversary, in the same, or in any other court, to re-litigate a matter directly put in issue and actually determined in the first suit, upon its appearing that the judgment in the first suit, by reason of the small amount in dispute, could not be reviewed by a court of appellate jurisdiction? Does the principle of *res adjudicata*, in its application to the judgments of courts of general jurisdiction, depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court? Upon principle and authority these questions must be answered in the negative."

We do not know that there is any difference in principle between a case which is not heard in the highest court because the amount involved is not sufficient and one which is not heard because it presents only a moot question. If the former is a bar to a subsequent suit between

the same parties, the latter must be, and the application of this principle of *res adjudicata* in a subsequent suit brought after the dismissal of this case upon the ground that it was only a moot question would, we think, undoubtedly prevent the re-opening of the matters involved.

The real controversy between the parties to the present record is whether the lease by the Terminal Company to Young is invalid and illegal as constituting a preference and advantage over Young's competitors. That question will continue throughout the pendency of the lease. The Commission's order is in substance and effect, if not in form, an adjudication of the illegality of the lease, and the decision of the Circuit Court is an affirmance of that adjudication. In the nature of the case the conditions will be the same after the two-year period as during it. If such a lease from November 1, 1908, to November 1, 1910, is illegal, its illegal character will continue after November 1, 1910. The Terminal Company cannot renew or resurrect the lease after November 1, 1910, and test the question in another proceeding, for the adjudication in this case would be conclusive; relief must be obtained in this suit or not at all.

Although on a strict adherence to form this case might be considered merely an action to enjoin an order which has expired by limitation, this view would subordinate substance to mere form. The suit is in reality to review the decision of the Commission, no different method of review being permitted. Its function is not solely to enjoin the future operation of the order, but to set it aside *ab initio*. The order of the Commission and the decision of the Circuit Court have not only established all future rights during the term of the lease, but have affected important rights during the past period of two years. If the decision below stands, the Terminal Company can collect no rent from Young under its lease for the past two years, and must charge him for that period, notwithstanding the lease, the regular wharfage fees prevailing at its public wharves; the whole accounting under the lease for two years awaits a determination of the legality of the lease, and that determination can be had only in this suit. In deference to a similar necessity in the interest of justice this Court granted relief in *New Orleans Flour Inspectors vs. Glover*, 161 U. S., 101. That case was an action by Glover to restrain the In-

spectors from enforcing against him an Act of the Legislature permitting them to charge inspection fees. The Court below enjoined the enforcement. Pending appeal the Act was repealed. In 160 U. S., 170, the Court dismissed the appeal as a moot case, but later, on the consideration that the injunction would preclude the Inspectors testing their right to recover fees for the period during which the Act was in force, this Court vacated its dismissal, reversed the injunction decree and dismissed the bill, 161 U. S., 101.

There is another reason why this case cannot be regarded as a moot case which would seem to be controlling. There is still a substantial controversy remaining, even though the order of the Commission may have expired. At the end of the report of the Commission the complainant is given leave to file a claim for damages. On this point, it is said, on page 97 of the Record :

> " There is no evidence in this record upon which reparation can be awarded, and complainant may be unable to make the requisite proof, but he may send to the Commission, if he so desires, on or before August 15, 1908, an itemized statement or bill of

particulars of the damages he claims to have sustained, with sufficient copies for service on the defendants against which the order in this case is directed. In case such bill of particulars is filed within the time named, the complainant will have opportunity, upon notice to said defendants, to make proof of the facts stated therein, before a special examiner or otherwise as may be arranged, and said defendants will have opportunity at the same time to introduce evidence in opposition to complainant's proofs. Upon such supplemental record, if one be made, the question of reparation will be further considered."

In pursuance of this permission the complainant Eichenberg has filed with the Commission within the time a claim for over $48,000 damages a copy of which is printed as an appendix to this brief. If this case is dismissed upon the ground that it is a moot case, then the question of the right of Eichenberg to damages on the claim filed by him is *res adjudicata*. There is therefore a substantial controversy still pending which is part of and arises from the proceeding in which the order of the Commission was issued. This case is therefore not a moot case

and this appeal cannot be dismissed upon that ground.

We have been unable to find any decision of this Court which presents the situation found in the case at bar, but a somewhat similar case is that of *Click vs. Sample*, 73 Ark., 194, where an injunction suit was brought to restrain the members of a school board from making a contract with a teacher. The temporary restraining order was granted, but on final hearing the injunction was dissolved. A bond in the sum of $250 had been given in the usual form of an injunction bond. The contract against which the injunction was sought expired by its terms before the appeal was heard. The Court was asked to dismiss the appeal upon the ground that it was a moot case, but declined to do so for the reason that there was still a substantial controversy before it, inasmuch as the judgment below fixed the liability upon the injunction bond, and at page 196, held :

> " The appellees move to dismiss the bill on the ground that the contract against which the injunction was levelled had expired by its terms prior to the taking of the

appeal; and insist that this court should not entertain a case merely to decide abstract questions where there is no substantial controversy remaining which is capable of enforcement, and that the costs, which are mere incidents of this terminated controversy, should not cause an appellate court to decide the abstract questions theretofore involved in order to adjudicate them. Authorities supporting these contentions are presented and have been considered. While the contract in controversy cannot now be enforced or enjoined, there is a judgment of the Chancery Court dissolving the injunction, and if that judgment stands unreversed, a liability is fixed upon the appellants, and their sureties on the bond. That judgment fixing this liability is a substantial controversy, beyond the costs, and can only be reviewed by hearing this appeal."

So in the present case the judgment below fixes the right of Eichenberg to damages in the claim filed by him in accordance with the leave granted by the Commission. This creates a substantial controversy still in existence, the law applicable to which can be determined only upon this appeal.

There is also a prayer in the complaint (record, p. 24) asking that if the order of the Commission is not set aside the contract between the Terminal Company and Young should be canceled, which leaves a controversy still pending between the parties which is still a live question, and is not affected by the expiration of the order of the Commission which it is sought to enjoin.

A dismissal of this appeal would mean the destruction of the title of the Terminal Company to its water-front property in Galveston and of the business of Young without any court ever having rendered an opinion in the case. It would in effect be a denial of justice so far as the immediate parties are concerned, but, aside from this view, it would leave unanswered by this court the important questions of the jurisdiction of the Commission, which are of general interest to the people of the United States. The substantial result of a dismissal of this case upon the ground that it is a moot case would be that no order of the Commission could ever again be reviewed by this court, if the Commission did not wish it, for in matters of such large importance it is easy to consume two years of time if a branch of the Government desires

so to do, and the Commission can, of course, if it so chooses, limit the period of its orders to one year or any time less than two years, which will prevent a review thereof.

We therefore submit that this case, because of its public importance and because to do otherwise would be a denial of justice to the parties thereto, should be heard upon its merits and be dealt with as it was when the controversy arose, and that it should not now be dismissed because, since the appeal to this court, the two-year limitation of the order of the Commission had expired.

We ask that the same rule should be followed in this case which was adopted by this Court in *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290. There the defendants objected to the hearing of the appeal, and asked dismissal on the ground that the Freight Association had been dissolved by a vote of its members since judgment was entered in the court below. This Court said, at page 307, that

> " the fact of the dissolution of the Association does not prevent this court from taking cognizance of the appeal and deciding the case upon its merits. * * * The mere dissolution of the Association is not the

most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed. * * * If the mere dissolution of the association worked an abatement of the suit as to all the defendants, as is the claim made on their part, it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow. * * * Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the

public, the enforcement of which the Government has endeavored to procure by a judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case. By designating the agreement in question as illegal and the alleged combination as an unlawful one, we simply mean to say that such is the character of the agreement as claimed by the Government. That question the Government has the right to bring before the court and obtain its judgment thereon. Whether the agreement is of that character is the question herein to be decided.

"We think, therefore, the first ground urged by defendants for the dismissal of the appeal, is untenable."

If a suit appealed to this Court by the Government is not dismissed because it has become a moot question, as in the *Trans-Missouri Freight Cases*, then it would seem to follow that a suit brought to this Court in which the Government is appellee should not be dismissed as a moot

case when the real questions involved still remain, vitally affecting both the Government and the private parties thereto.

No better statement of the rule which should govern this question can be given than that of the New York courts, where it was said:

> " While the time has long since passed when any decision in this matter can have any practical efficient operation, we will, *in view of the public importance of the questions involved, overlook that circumstance, and proceed to the determination of the matter upon its merits upon the facts as they appear in this record*" (*supra*).

SIXTH POINT.

The judgment of the court below should be reversed.

MAXWELL EVARTS,
Counsel for Appellants.

APPENDIX.

Claim of Carl Eichenberg for reparation filed with and now pending before Interstate Commerce Commission pursuant to provision in its report.

BEFORE THE INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

CARL EICHENBERG vs. SOUTHERN PACIFIC CO. ET AL.	No. 1277.

Now comes the complainant in the above numbered and entitled cause, by and through his attorneys, and in compliance with an order of the Commission made and entered on the 24th day of June, A. D. 1908, in this behalf, files this his Bill of Particulars of his claim for reparation against the defendants, and shows to the Commission that he has sustained damages in this behalf, in the several sums of money, and

in the manner and form as hereinafter set forth, as follows, to wit:

RECAPITULATION OF LOSSES.

Merchandise account.	Debit.	Credit.	Loss.
Cotton Seed Meal	$597,030.41	$590,563.20	
Cotton Seed Cake	24,146.05	23,790.18	
	$621,176.05	$614,353.38	$6,111.34
As shown by Exhibit A hereto attached.			
Profit and Loss Acct.	$2,384.66	$18.42	$2,366.24
As shown by Exhibit B hereto attached.			
Expense Acct.	$18,140.19	$32.88	$18,107.36
As shown by Exhibit C hereto attached.			
Interest Acct.	$4,285.60	$180.26	$4,104.84
As shown by Exhibit D hereto attached.			
Total Losses			$30,689.78
Amount of cotton seed meal and cake handled during the period complained of 22.344 short tons. Young's advantages measured in money per ton, arising solely by reason of the contract complained of, at 79 cents per ton, 22.344 tons 79c.			$17,651.76
Grand Total Damages Claimed, and for which an award is prayed,			$48,341.54

Premises considered, complainant prays that service of the accompanying three copies of this Bill of Particulars, with the exhibits thereto attached be made against the defendants the Southern Pacific Company, the Southern Pacific Terminal Company, and the Galveston, Harrisburg and San Antonio Railroad Company, de-

fendants; that a special examiner or commissioner be named or appointed to take the testimony at Galveston, within a short day to be named by the commission, and that upon such testimony being taken and upon further consideration of this complaint, that complainant be awarded damages against the defendants in the sum of $48,341.54 with costs. And complainant prays for such other and further relief as he might be hereunto entitled on the case made, and will ever pray, etc.

MARSENE JOHNSON,
GEO. G. CLOUGH,
JOHN C. WALKER,
GEO. H. TERRIBERRY,
Attorneys for Complainant.

THE STATE OF TEXAS,
County of Galveston.

Before the undersigned authority personally appeared CARL EICHENBERG, who being duly sworn deposes and says: that the above and foregoing statement is a true and substantial statement of his loses sustained by reason of the

preferential treatment of E. H. Young by the defendants in the above entitled cause, as the same is shown by his books.

CARL EICHENBERG.

Sworn to and subscribed before me, this 12th day of August A. D. 1908.

GEO. G. CLOUGH,
Notary Public,
Galveston,
Tex.

(SEAL)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 488.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY and GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY,

Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION and E. H. YOUNG,

Appellees.

No. 489.

E. H. YOUNG,

Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY et al.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR ALL APPELLANTS.

MAXWELL EVARTS,
F. C. DILLARD,
E. M. GARWOOD,
Of Counsel for Appellants.

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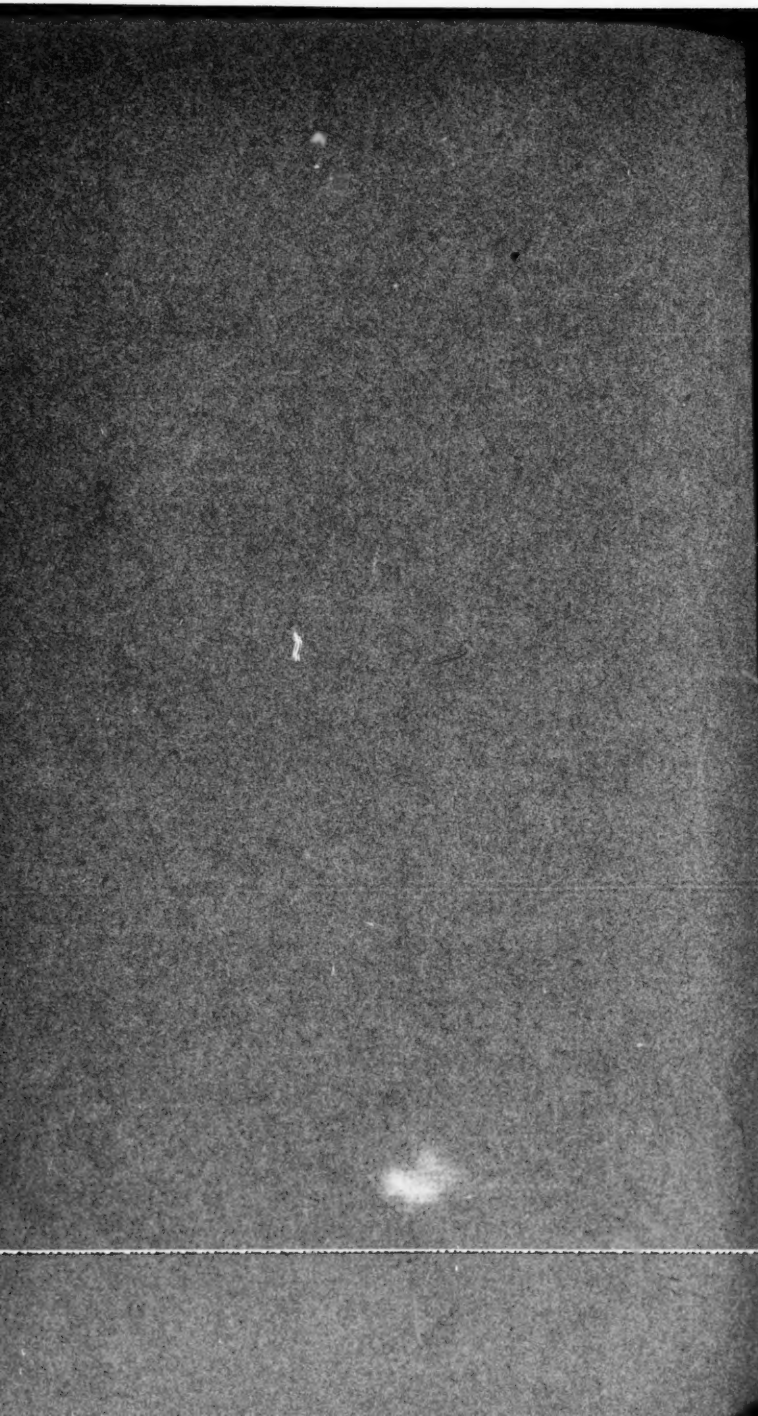


In the Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 459.

SOUTHERN PACIFIC TERMINAL COMPANY, SOUTHERN PACIFIC COMPANY, AND GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY,

Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, and E. H. YOUNG,

No. 460.

E. H. YOUNG, Appellant,

vs.

THE INTERSTATE COMMERCE COMMISSION, SOUTHERN PACIFIC TERMINAL COMPANY, ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR ALL APPELLANTS.

Statement.

The Interstate Commerce Commission in a proceeding pending before it on complaint of a shipper on June 24, 1908, ordered that—

> " the Southern Pacific Company, Southern Pacific Terminal Company and Galveston, Harrisburg & San Antonio Railway Company be and they are hereby notified and required to cease and desist, on or before the first day of September, 1908, and for a period of not less than two years thereafter abstain from granting and giving to one E. H. Young, a shipper of cotton seed products through the port of Galveston, Texas, or to any other person whatsoever, undue preference and advantages which now accrue to said Young through failure of said defendants to exact from said Young payment of wharfage charges for the handling of cotton seed cake and meal over said wharves, docks and piers of said defendants at said Galveston while at the same time exacting said wharfage charges from other shippers of cotton seed cake and meal over said wharves, docks and piers * * * and from giving or allowing to E. H. Young

> or any other person whatsoever for his exclusive use space on the wharves of said defendants at said Galveston for use in the storage and handling of cotton seed meal and cake while contemporaneously refusing and denying similar privileges in connection with said wharves to other shippers of said cotton seed cake and meal whose shipments of said commodities are offered to said defendants under substantially similar circumstances and conditions" (Record, p. 19).

The effective date of the order was subsequently postponed to November 15, 1908 (Record, p. 48).

The purpose and effect of this order were to invalidate a contract of lease made by the Southern Pacific Terminal Company to E. H. Young of a pier known as Pier C for use in his private business. The defendants in the proceeding before the Commission (Young was not a party, Record, p. 135) brough suit on August 13, 1908, in the United States Circuit Court for the Southern District of Texas to enjoin, suspend and set aside said order of the Commission, joining Young as a defendant and praying as against him that, if the Commission's order be held valid, he be enjoined from enforcing his lease (Record, p. 24). Young filed an answer and

cross-bill admitting the allegations of the bill, asserting the validity of his lease, and joining in the prayer that the Commission's order be enjoined (Record, pp. 27–39). The Commission demurred to both bill and cross-bill (Record, pp. 52, 57). The demurrers were overruled by the Circuit Court (Record, pp. 59, 204), and the Commission answered (Record, p. 65).

On final hearing the bill and cross-bill were dismissed without any opinion by the Court below on December 23, 1909 (Record, p. 205). The facts were presented at final hearing in the form of an agreed statement. The important facts shown by the statement are as follows:

The Southern Pacific Terminal Company is a Texas corporation, with charter power to construct, buy, lease, own, maintain, operate and convey warehouses, docks and wharves and to enjoy the privileges and franchises granted by Act of Legislature ratifying a Galveston ordinance of February 4, 1899 (Record, p. 100). The Terminal Company acquired from C. P. Huntington's estate certain water front property at Galveston which had been acquired by Mr. Huntington through various mesne conveyances from the original grantee of the Republic of Texas, and certain rights and privileges con-

nected with this property conferred upon Mr. Huntington by an ordinance of the City of Galveston ratified by said Act of the Legislature (Record, pp. 107–127). Certain conditions appear in some of the deeds, and in the ordinance and statute but it is stipulated that all such conditions were performed (Record, p. 127). The docks, piers and other property of the Southern Pacific Terminal Company are upon the property so acquired (Record, p. 127). The Southern Pacific Terminal Company erected two piers on its property known as Piers A and B and has maintained them as public wharves, charging a fixed wharfage for all freight passing over said piers to or from vessels berthed thereat (Record, p. 130). The Galveston Wharf Company affords similar public wharfage facilities at the port of Galveston, having a number of piers (Record, p. 129). The appellant Galveston, Harrisburg & San Antonio Railway Company owns a railroad in Texas entering Galveston which is connected with the tracks on the Terminal Company's wharves (Record, p. 106) and those of the Galveston Wharf Company (Record, p. 105). The appellant Southern Pacific Company owns 99 per cent. of the stock of the Galveston, Harrisburg & San

Antonio Railway Company and of the Southern Pacific Terminal Company and owns a line of steamships plying between New York and Galveston (Record, p. 105). Ordinarily traffic brought by the Galveston, Harrisburg & San Antonio Railway to Galveston for movement via Southern Pacific Company's steamers and *vice versa* passes over the wharves of the Southern Pacific Terminal Company (Record, p. 105), although in exceptional instances Southern Pacific Company steamers berth at the piers of the Galveston Wharf Company (Record, p. 106). Several railroads enter Galveston in which Southern Pacific Company has no stock interest, but as they have no physical track connection with the wharf tracks of the Southern Pacific Terminal Company their cars are switched to the wharves by the Galveston, Harrisburg & San Antonio Railway which charges for such switching $1.75 per car (Record, p. 106).

The Southern Pacific Terminal Company makes a trackage charge of 50 cents per car against the Galveston, Harrisburg & San Antonio Railway Company and all other railroad companies for cars placed upon the wharf tracks (Record, p. 106). The Terminal Company charges 20 cents per ton on cotton seed

meal and cake passing over its docks as a wharfage charge (Record, p. 106). The Southern Pacific Terminal Company owns no cars or locomotives and issues no bills of lading (Record, p. 106). The facilities furnished by Piers A and B are adequate for the wharfage demand (Record, p. 130). Having land adjoining its Pier B lying idle and useless and not needed in its wharfage business the Terminal Company under date of June 26, 1905, entered into a contract with Young amended by contract of November 1, 1906, whereby it constructed on this land a dock or pier known as Pier C and erected thereon a warehouse, shed and platform at a cost of about $65,000. and leased the same to Young at a rental of $15,000. per annum for a period of 5 years from November 1, 1906 (Record, pp. 131, 82–85). Young equipped said property with machinery, etc., at a cost of about $50,000. (Record, p. 132). Young's business consists of buying cotton seed cake in the interior, shipping it to himself by carloads at Pier C, there grinding it into meal, sacking it, and loading it into steamships berthed at Pier C for export (Record, p. 132). No wharfage or storage charge is paid by Young other than as the same may be included in his rental of $15,000.

per year (Record, p. 132). Young has ample capital for the transaction of a large business. He saves the demurrage charges of the railroads by unloading his freight within the allowance of free time, makes a profit doing the unloading from the cars by his own employees at the regular price allowed by the railroads for unloading, and a further profit in the stevedoring to and from ships which he does also by his own employees at prices allowed by the ships therefor (Record, pp. 132, 133). He frequently charters the vessels on which he ships his meal, and can thus fill orders at ports to which regular steamers do not run, and also obtains charterer's commission (Record, p. 133). By these various means Young makes a profit of 30 to 40 cents per ton more than he would if he handled his product by methods in existence before he established his plant on Pier C (Record, p. 133). He buys at a higher price and frequently undersells his competitors (Record, p. 133). During the year September 1906 to September 1907 Young's exports were more than double the amount of meal exported by all other persons from Galveston (Record, pp. 133, 134).

Young buys cake and meal in Texas, Louisiana, Oklahoma and Arkansas, but chiefly in

Texas, and ships it on bills of lading showing Galveston as its destination. He buys the product for export, Europe being almost the sole market (Record, pp. 133, 134). When ground and ready for export to fill orders received, Young takes out ship's bill of lading to his own order (Record, p. 134).

This controversy was instituted by a Galveston exporter of cotton seed meal who complained to the Commission that the agreement between the Terminal Company and Young constituted an unlawful preference and advantage in violation of Section 3 of the Act to Regulate Commerce (Record, p. 135).

Specification of Errors.

The Circuit Court erred in dismissing the bill of complaint and thereby sustaining the order of the Commission in the following respects:

1. In that the Commission was without jurisdiction over the Southern Pacific Terminal Company since that Company is not a common carrier and is not subject to the Act to Regulate Commerce.

2. In that the Commission had no power or jurisdiction to declare invalid and illegal the

lease made by the Southern Pacific Terminal Company to Young.

3. In that the lease by the Southern Pacific Terminal Company to Young does not constitute an unlawful or undue preference or advantage within the meaning of the Act to Regulate Commerce.

4. In that the Commission by the order in suit assumed to control and regulate intrastate and foreign commerce not subject to the Act to Regulate Commerce.

FIRST POINT.

Can the Interstate Commerce Commission deny to a wharf company, chartered under the laws of the State of Texas, the power to lease or convey real estate which it owns in fee simple?

The Southern Pacific Terminal Company is a corporation chartered under the laws of the State of Texas. Its articles of incorporation are of date July 6, 1901, and, as shown thereby, the purposes and powers of said corporation are as follows:

> "The purposes for which this corporation is formed are to construct, buy, lease, own,

maintain, operate and convey warehouses, docks and wharves and grain elevators, including the construction, owning and operating docks on the coast of this State for the protection and accommodation of ships, boats and all kinds of vessels for navigation and their cargoes" (Record, p. 100).

By deed dated July 10, 1901, the Southern Pacific Terminal Company acquired the property in controversy, together with other property fronting on Galveston channel, from Collis P. Huntington, who had previously, to wit, on the 25th day of January, 1899, acquired the same from the Galveston City Company. The Galveston City Company had purchased the property from the original grantee, M. B. Menard. Menard had acquired the land from Juan N. Seguin, to whom the same had been granted by the State of Coahuila and Texas, but not resting upon the Spanish title he had procured a patent therefor from the State of Texas on the 25th day of January, 1838. This patent was issued to him in accordance with an act of the Texas Congress, approved December 9, 1836, entitled "An Act relinquishing one league and labor of land to Michael B. Menard and others on the East end of Galveston Island"

(See Gammell's Laws of Texas, Vol. 1, p. 1130). These several steps in the title to this property may be found in the agreed statement of facts (Record, pp. 107–122). There was some controversy at an early date as to whether the grants to Menard covered what is known as the "flats" on the east end of the Island, being the land between high tide limits and the channel. These controversies were all ultimately determined in favor of the Menard grant, which was not only sustained as to its validity, but as to its covering the territory intervening between high tide limits and the channel.

In *City of Galveston vs. Menard*, 23 Tex., 408, Judge ROBERTS said:

> "The right, then, of Menard and his vendees to the soil in the flats in front of the lots out to the channel is fully recognized. This may, in the course of time, when they are reclaimed by being filled up so as to become the site of business houses, be subject to the right of opening cross streets when it can be practically done, and where such right may not have been lost. This right to the soil on the channel in front of the lots may be devoted to wharves and the like without being subject to the control of the public."

The Menard title was also attacked in *State of Texas vs. Galveston City Company*, 38 Tex., 13. The Galveston City Company having acquired all of Menard's rights in the lands granted, the title was again sustained. There was litigation between the Galveston Wharf Company, a vendee of the Galveston City Company, and the City of Galveston, as will be seen by reference to the cases of *Galveston Wharf Company vs. City of Galveston*, 63 Tex., 14, and *Galveston City Company vs. City of Galveston*, 56 Tex., 486. The City of Galveston had claimed the right to the flats above mentioned, and to open streets across the property and to erect and maintain wharves at the end of the street. While the title of Menard to the flats and out to the channel was sustained by Judge ROBERTS in the case mentioned, the other question as to the rights of the City of Galveston to open streets, etc., was, to some extent, open, and it is found that on June 23, 1870, the Legislature of the State of Texas passed an Act, entitled "An Act to confirm the compromises and settlements between the corporation of the City of Galveston, Galveston City Company, the Galveston Wharf & Press Company and the Galveston Wharf Company." The several

deeds herein above referred to make it entirely clear that the Southern Pacific Terminal Company acquired an absolute fee simple title to its property, coming down from Menard to the Galveston City Company, from the Galveston City Company to Huntington and from Huntington's executors to the Southern Pacific Terminal Company. There was no necessity for any ordinance from the City of Galveston or for any act of the Legislature except for the purpose of securing from the City of Galveston a valid relinquishment of the municipal right often asserted by it of opening streets through the Bay front property and constructing wharves thereon. For this purpose only the ordinance of February 4, 1899, was passed and was approved by Act of the Legislature of date May 1, 1899. (The ordinance will be found set out in the Act, which is printed in full at page 1 of appendix to this brief.)

It had already been decided by the Supreme Court of Texas in the *Menard Case* that all right of the Republic of Texas in and to these flats out to the channel had been acquired by Menard, and, as we have seen, such right was conveyed by Menard and his associates to the Galveston City Com-

pany, from whom Huntington acquired the same. The act of the Legislature above stated merely approves the ordinance of the City of Galveston, which abandoned, discontinued and closed certain streets, avenues and alleys of the City of Galveston and authorized and empowered Huntington, his heirs and assigns,to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the City of Galveston. The title, therefore, of the Southern Pacific Terminal Company is an absolute unfettered fee simple title, and there is no ground for the statement by the Interstate Commerce Commission in its opinion to the effect that it is a conditional title. The commission in its opinion says (Record, p. 92):

> "It is argued in behalf of the Terminal Company that it has supplied and maintains ample terminal facilities for the Southern Pacific system and the use of the public, aside from the premises leased to Young, and that it has the right under its charter to grant to him, to be used for any purpose, that portion of its property which otherwise it is said would be unoccupied and unproductive. If the title of the Terminal

> Company to the land possessed by it on the water front in Galveston were held in fee simple, this contention might be tenable, because we know of no restriction upon the alienation of real estate merely because the owner is a corporation. * * * The land now owned by the Company is apparently charged with the public use expressed in the grant to Huntington. The latter had a conditional title, and could convey to the former no greater rights than he possessed. * * * The company could doubtless assign its right to this land to be used by the grantee for wharfage purposes, but we are of the opinion that it cannot be transferred to be used for a purely private purpose, particularly to a shipper who thereby obtains an unjust advantage over other shippers."

The Interstate Commerce Commission incorrectly supposes that the title to the property was acquired by the ordinance of the City of Galveston and the special act of the Legislature approved same. This is not true. Huntington acquired an absolute fee simple title, and in return for the release by the City of Galveston of any right to open a street over the property acquired, and the approval by the State of

Texas of the ordinance passed to that end, agreed to commence the construction of terminal facilities upon the property for the use of the Southern Pacific Railroad and Steamship lines, and within two years to expend upon the same at least one hundred and fifty thousand dollars ($150,000.00), and also agreed that the wharfage charge, if any, should be subject to the regulation of the Railroad Commission of Texas. It was also agreed that neither Huntington or any person or corporation acquiring his rights in the property should ever acquire any interest in the Galveston Wharf Company. It is admitted that all of these so-called conditions have been fully complied with. The one hundred and fifty thousand dollars has been expended for the purpose demanded by the ordinance, and there is no contention made that either the State of Texas or the City of Galveston has ever set up any claim of a forfeiture of such rights as were conveyed by the ordinance (Record, p. 127). It is therefore impossible to sustain the contention made by the Interstate Commerce Commission that the Southern Pacific Terminal Company did not have an absolutely clear fee simple title to the premises, which it acquired from Hunting-

ton and which it leased to Young, and the Interstate Commerce Commission recognizes the fact that if this is a fee simple title it had no right to declare the lease thereof to Young, made under the direct powers of its charter, illegal. The Terminal Company has erected Piers A and B, which are sufficient to accommodate all commerce that flows over them. In addition to the property conveyed by these facilities, it had a large water frontage which was entirely useless, and if the Interstate Commerce Commission has power to annul the powers conveyed to the Terminal Company in its charter and prevent its alienation, all of this property will doubtless continue to remain unused and profitless to its owner. On this unused property thus held in fee simple title there was an unused bulkhead constructed for the purpose of preventing sand from drifting into the slip on the west of Pier "B." This property yielded no revenue to the Terminal Company and was not necessary for the use of the public. Appellant Young proposed that if the same were leased to him for a period of five years and a platform and shed erected thereon, he would install machinery and use it for warehousing and sacking his products preparatory for shipment to European ports.

The contract was made, the Terminal Company expending $65,000 in the erection of the platform and shed and Young $50,000 in the installation of his machinery, paying for the rental of the premises the sum of $15,000 per year (Record, pp. 130–134).

The Interstate Commerce Commission seems to base its opinion upon the proposition that this contract between the Terminal Company and Young is in violation of the terms of the grant. While an inspection of the act of the Legislature and ordinance above quoted, as well as of the several deeds of conveyances through which the Terminal Company claims title, will show that this is not true, it is fundamental law that if the estate granted had been conditional, only the State of Texas or the City of Galveston could have set up the forfeitures and retake the estate. The facts are clear that ample facilities were afforded by the Southern Pacific Terminal Company for all commerce passing over the wharf which it had established. Having done this and thereby complied with the ordinance of the City and the special act, the city was forever precluded from undertaking to open any streets through the property, and the State forever precluded from setting up any claim to the

water flats, even if such claim had not been absolutely determined against the State in the *City of Galveston vs. Menard*, herein referred to. The question then resolves itself into the proposition whether the owner of property abutting upon a navigable stream can devote it to any other purpose than that of a public wharf. It is respectfully submitted that even if the Interstate Commerce Commission had jurisdiction or authority to decide such question, based as it confessedly is upon the proposition that the title of the Terminal Company to the property is conditional and not absolute, that there is no precedent for such a holding.

The case of *L. & N. R. R. Co. vs. West Coast Naval Stores Company*, 198 U. S., 483, is very much in point. There, the Louisville and Nashville Railroad Company, which had adequate terminal facilities, sufficient for all freight passing over its lines to Pensacola, had acquired a wharf. This wharf was used by the railroad company only for goods which it delivered to a particular water carrier. The West Coast Company contended that because the wharf was erected under authority from the city, at the foot of a public street, this made it a public wharf, that must be open to the public in general, and

that because the railroad company carried certain classes of goods to the wharf it must carry all alike, to be delivered to any water carrier that might there apply for them. The court said (at 495):

> " We are of opinion that the wharf was not a public one, but that it was a mere facility erected by, and belonging to, defendant, and used by it in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation. Neither the public nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf a depot or place of storage of the defendant for goods to be delivered at or taken from the City of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received to be transported therefrom by de-

fendant. All consignees of goods at Pensacola had equal facilities for obtaining them there. Although not bound originally to carry goods beyond its own terminus at Pensacola, yet the defendant might agree to do so, and it had the right, when duly authorized by the proper authority, to construct facilities to enable it to continue such transportation beyond the line of its railroad by such other carriers as it might agree with . . . The defendant never became a common carrier as to this wharf, in the sense that it was bound to accord to the public or to plaintiff a right to use it upon payment of compensation. We do not see that the plaintiff had any right even to demand that the defendant should carry plaintiff's goods on the rails defendant had laid down to reach the wharf from its depot or yards at Pensacola, the terminus of the road at that city. Those rails were only laid for the purpose of reaching the wharf, in order that defendant might carry goods to it which it had undertaken to forward by itself, or by vessels it had arranged with beyond its line. . . . That the defendant had the right to choose its own agencies, and grant to them the exclusive privilege of access to its own wharf, which is built only for the purpose of continuing the transpor-

tation of goods which it had transported to the end of its line, has in effect been decided by this Court. *Atchison, etc., R'y. Co. vs. D. & N. O. R. R. Co.*, 110 U. S., 667."

Under the reasoning of this decision, if the Southern Pacific Terminal Company were not in existence, and this property belonged to the Galveston, Harrisburg & San Antonio Railway Company absolutely, we utterly fail to see how it would be deprived of its right to lease or convey this unused part of its property, when it had fully complied with the terms of the ordinance requiring it to provide facilities for the Southern Pacific Steamship Companies. Having done this, it had the perfect right to construct a private wharf there, or it could lease the property to another, who could do the same thing, and use it either for his own purposes, or devote it to the use of such water carriers as he saw fit. In other words, the construction of a wharf on property abutting upon navigable water does not *per se* affect the wharf constructed with a public use.

To the same effect is the case of *Weems Steamboat Company vs. Peoples Steamboat Company*, 214 U. S., 345, the opinion being delivered

by Mr. Justice PECKHAM. The Court, citing the case above quoted with approval, says at p. 357:

> "There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held. The question as to the right of the owner to exclude others from the use of a private wharf on a navigable stream has been very recently decided by this court in *Louisville, &c., Ry. Co. vs. West Coast Naval Stores Co.*, 198 U. S., 483, and the right of such owner to exclude any or all other persons from the use of such wharves was affirmed. *The owner was not, it was also said, compelled to use the wharf exclusively for his own business, or else to throw it open for the use of everyone.* That he could not only use it himself, and permit some others to use it, but might, at the same time, exclude still others to whom he did not choose to grant such right."

The Court again says at p. 358:

> "We see no sufficient reason for subjecting a private wharf to the public use, which may frequently include that of a competitor with the owner, simply because there is no

other wharf at the place. A public wharf, it is presumed, may be built, or if there be no place for one, the private wharf might be taken by public authority for the public use upon compensation being made for the taking of the property."

The Interstate Commerce Commission, in its opinion in this case, seems to have become inextricably confused by intermingling the conditions imposed by the ordinance as a consideration for relinquishing its rights to open streets across the property, and the fact that this property abutted upon navigable waters. It seems to have entirely lost sight of the principle established in the above cases, and proceeds upon the assumption that because interstate commerce may pass over a wharf, that wharf, although it may be strictly a private wharf, and although it is not a common carrier in any sense, thereby becomes subject to its jurisdiction. The right to erect a landing on a navigable stream has its foundation in the ownership of the land, and when erected by an individual or corporation at its own expense, it is private property. Thus, in the case of *Leverich vs. Mayor of Mobile*, 110 Fed. Rep., 170, it was held that the wharves there involved were private property, and that the

city was wholly without power to apply to them an ordinance which prohibited the charge of wharfage. The Supreme Court of Alabama, in *Compton vs. Hankins*, 90 Ala., 411, says at p. 414 :

> "The owner has the same dominion and power to control such landing places as any other private property, and to possess and use the same to the exclusion of the public. * * * Wharves or landings may be either private or public in their nature. If public, the owner is under obligation to concede to others the privilege of landing their goods. If private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper. Whether a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied, and the nature and character of the structure. * * * The right to erect a landing on a navigable stream, having its foundation in the ownership of the land, when erected by an individual at his own expense, it is private property."

In *O'Neill vs. Annett*, 27 N. J. Law R., 290, it is held that a wharf is private property, and cannot

be used by the public without the owner's consent, and where the owner permits it to be used by others he does not thereby dedicate it to the public, or give the right to use it without his permission, the court holding that in such a case the mere usage by the public is no evidence in itself of the dedication of a wharf to public use. See, also, *Woodruff vs. Havemeyer*, 106 N. Y., p. 129.

Authorities might be multiplied, but it must be taken to be the unquestioned law that the owner of land abutting upon navigable waters has the right to erect thereon wharves, either public or private, and that he can convey these lands to others, who can make such use of them as they see fit, provided it does not interfere with the use of the navigable water by the public. The Southern Pacific Terminal Company owned in fee simple ten blocks of land, extending to the thread of the channel. The only easement of any character upon this land was the right of the City of Galveston to open streets across the same. This right, by ordinance confirmed by act of the legislature, it waived, upon condition that there should be erected certain facilities for the accommodation of the ships and railroads belong-

ing to what is commonly termed the Southern Pacific System. This condition was fully complied with. There is still a great part of this property not used for wharfage purposes, and not necessary therefor. A part of this unused property is leased to Young, who caused to be erected thereon a shed and platform, where he warehouses his products, converts cotton seed cake into meal, and there sacks it, and thence delivers it to ships. If the Terminal Company has not this right to lease or convey its property to Young, then it has no right to lease or sell any remaining portion of the unused lands within the boundaries of the grant, lest some man of business force and sagacity should erect thereon warehouses and machinery which would enable him to more satisfactorily transact his business than his competitor. It is not believed that it was intended that powers of this character should be conferred upon the Interstate Commerce Commission, nor that authority therefor can be found in the act creating that body. It must not be forgotten that the Southern Pacific Terminal Company is not a common carrier in any sense. It is chartered purely as a wharfage company, has no power under its charter to act as a common carrier, and performs none of the

functions thereof. It owns no cars or locomotives, issues no bill of lading, and performs no duty of a common carrier. It receives its charter powers from the State of Texas, and among the powers conferred is to lease and convey the property which it has acquired and owns in fee simple. Under the decisions, it is submitted that even if it were a common carrier, and if the jurisdiction of the Interstate Commerce Commission were unquestioned, it, nevertheless, has the right to sell or convey unused portions of its property which it owns in fee simple.

In the case of *Calcasieu Lumber Company vs. Harris*, 77 Tex., 18, the Houston and Texas Central Railroad Company leased a portion of its right-of-way, which it owned in fee simple title, to the Calcasieu Lumber Company, which erected thereon a lumber yard, and bought, sold and distributed lumber therefrom. Harris brought suit against the Calcasieu Lumber Company for damages, alleging that he was in the lumber business; that the Calcasieu Lumber Company, by reason of its occupancy of the right of way, was afforded illegal advantages, and that the statute did not permit such a lease by a railway company of its right of way. The statute referred to was as follows (p. 21):

"The Railway Company shall have the power, either by its own employes or other persons, to construct any building along the line of their railroad to be occupied by their employes or others, except at their respective depot stations and section houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter for their employes; nor shall they use, occupy or cultivate any part of the right of way over which their respective roads may pass, with the exception aforesaid, for any other purpose than the construction and keeping in repair their respective railways."

Judge STAYTON held at p. 22:

"There is nothing in the article evidencing an intention to take away from a railway company, so long as it owns the fee in land, the rights and powers usually incident to such ownership, and the power of the legislature to do this may be questioned, unless in a case where this may become necessary as a police regulation. The ownership of land, when the estate is a fee, carries with it the right to use the land in any manner not hurtful to others, and the

> right to lease it to others, and therefrom derive profit, is an incident of such ownership."

This case is much more extreme than the one at bar. In the first place, the Houston and Texas Central Railroad Company is an unquestioned common carrier, and subject to governmental regulation. It permits a business competitor of the plaintiff to occupy its right of way with its sheds and facilities for its business, but the court holds that the statute quoted does not place any limitation upon the right of the company to exercise the usual rights of ownership over property which it owns in fee simple title.

In the case of *A. T. & S. F. Ry. Co. vs. D. & N. O. R. R.*, 110 U. S., 667, 682, it was said:

> "A station may be established for the special accommodation of a particular customer. But we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation."

Missouri Pacific Railway Company vs. Nebraska, 164 U. S., 403, was that of a suit for

mandamus brought by the State of Nebraska to compel the Missouri Pacific Railway Company to comply with an order of the Railroad Commission of that State to permit the erection of a grain elevator for the use of certain individuals, at a point where the railway company had permitted the erection of two other elevators by private persons on its right of way at a station. The suit was brought upon the theory that the erection of the first two elevators was a discrimination against others who desired the same privilege. The State Commission, having so found, entered its order that the railway company permit the erection of the third elevator upon substantially the same terms upon the premises of the railway company. The court held that the order in question required the corporation to surrender a part of its land for the purpose of building and maintaining an elevator, and was in essence and effect the taking of the private property of the railway corporation for the private use of individuals, and that this was not due process of law. We submit that an order of the Interstate Commerce Commission which forbids a wharf company from using, by way of lease, its property for warehouse and manufacturing purposes, is just as effectual to

confiscate private right as is the order of the Nebraska Commission, which compels a railway company to surrender its property for a like use.

The reasoning of *Central Stock Yards Company vs. L. & N. Ry. Company*, 192 U. S., 568, leads to the same conclusion.

The United States Circuit Court for the District of Oregon, in *U. S., &c., vs. Oregon R. R. & Navigation Co.*, 159 Fed. Rep., 975, holds that a railway company may establish a station for the special accommodation of a particular customer, and refuse to establish a like station elsewhere for the accommodation of others, and may also grant to one person the right to erect a warehouse or elevator on its right of way, and refuse to grant the same privilege to another in the exercise of the right of its private property.

The Interstate Commerce Commission, in its twenty-second annual report (1908), page 78, referring to the opinion of Judge WOLVERTON, in the case last cited, says:

> "It was in this case that the doctrine was announced that a railroad company may establish a station for the special accommodation of a particular customer, and refuse to establish a like station else-

> where for the accommodation of others, and may also grant to one person the right to erect a warehouse or elevator on its right of way, and refuse to grant the same privilege to another in the exercise of its right of property."

The Commission makes no comment upon the decision.

If, as held in these and other cases, an unquestioned common carrier has the right to thus use its property, it is inconceivable to us that a wharf company, which, under its charter, has the right to sell, lease and convey its property, cannot make of such property, which is lying idle and unused, devoted to no public purpose, such use as it deems proper, subordinate to the right of the public to use the adjacent navigable waters. The Commission seems to have some appreciation of this proposition, because it says (Record, p. 93) :

> " The Company could doubtless assign its right to this land to be used by the grantee for wharfage purposes, but we are of the opinion that it cannot be transferred to be used for a purely private purpose."

There is no such condition in any deed through which it acquired title, there is no such pro-

vision in its charter. To the contrary, the privilege of disposition is absolute and unqualified. There is no such provision in any statute, State or Federal, but the Commission holds that because the party had there erected his warehouse and machinery, and did a larger business than some of his competitors, this is a violation of those sections of the Interstate Commerce Act which forbid undue preference upon the part of a common carrier.

SECOND POINT.

The Southern Pacific Terminal Company is not a common carrier and is not subject to the jurisdiction of the Interstate Commerce Commission.

The position of the Interstate Commerce Commission in this matter is that, because the Southern Pacific Company, which owns the ships berthing at the piers of the Southern Pacific Terminal Company, also owns controlling interests in the stock of the Galveston, Harrisburg and San Antonio Railway Company, and in the stock of the Southern Pacific Terminal Company, and because the Galveston,

Harrisburgh and San Antonio Railway Company moves its cars to the wharves of the Terminal Company, thereby a consolidation is effected, and the wharf company becomes a common carrier. The attention of the court is directed to the fact that the wharf company performs no service of a common carrier. It owns no rolling stock, transports no product, issues no bill of lading, does not hold itself out as a common carrier, and is not such, in fact, unless the bald fact of common stock ownership makes it such. It will be noted that the Galveston, Harrisburg and San Antonio Railway Company owns no stock in the Terminal Company, nor does the Terminal Company own any stock in the railway company. The Terminal Company is chartered solely as a wharf company, and cannot, under its charter, act in any other capacity. If John Smith owned the Southern Pacific Terminal Company and owned no stock either in the Galveston, Harrisburg and San Antonio Railway Company or the Southern Pacific Company, it would scarcely be contended that because commerce to and from Europe passed over his wharf, he thereby became a common carrier, subject to the jurisdiction of the Interstate Commerce Commission. The question

then arises whether the ownership by the Southern Pacific Company of the stock of the Terminal Company and that of the railway company cansolidates these different corporations, and makes them in legal contemplation the same agency. We are aware that in certain cases where, for the purpose of evading laws criminal in their character, holding companies have been organized as a part of what is in reality a conspiracy to evade the law, which acquire the stock of competitive corporations for the purpose of operating them as a single concern, the law will look through the corporate form, and consider the formation of the various corporations as a part of a general scheme to evade the law. This was the case in *Northern Securities Company vs. U. S.*, 193 U. S., 197. There the bill alleged that the Securities Company was not organized in good faith to purchase and pay for the stocks of the Great Northern and the Northern Pacific Railway companies, but solely to accomplish the pooling of the stocks of said companies, and carry into effect the illegal combination. There was no consideration for the transfer of the stock of the defendant company to the Northern Securities Company, other than the issue of the

stock of that company for the illegal purpose, it being merely a depositary, custodian or holder of the stock of the Great Northern and Northern Pacific Railway companies, which was evidenced, among other things, by the fact that while its actual capital was but $30,000.00, its authorized capital stock was $400,000,000.00, which was just sufficient to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway companies. From the observations of the dissenting justices, as well as Judge BREWER, who concurred in the majority, it is apparent that if the Northern Securities Company had been an independent company, buying stocks in the open market in good faith and in the usual course of business, as an investment, a different conclusion would have been reached. Justice BREWER says, at page 361:

> "Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock of

the Great Northern Railway Company, he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him, through that ownership, a control over both companies. In other words, the right which all other citizens had of purchasing Northern Pacific Stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall vs. Great Northern Railway*, 161 U. S., 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: 'Doubtless these stockholders could lawfully acquire, by individual purchases, a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the Companies would still remain separate corporations, with no such interests, as such, in common.'"

In the *Pearsall case* quoted by Justice BREWER, there was a direct purchase of the stock of one railway line by its competitors. In the case at bar, there is absolutely nothing to show that the

ownership of stock of the Southern Pacific Terminal Company by the Southern Pacific Company is anything other than the ordinary purchase in due course of trade, as is also that of the Galveston, Harrisburg and San Antonio Railway Company. The Southern Pacific Company, by its charter, is authorized to purchase such stocks and other classes of securities, and the fact that it also owns the stock of a common carrier certainly cannot operate to consolidate and make one a wharf company and a railroad company, any more than it could consolidate and make one a banking corporation and a railway corporation, the stock of which it chanced to buy in the open market. This is clearly decided in *Pullman's Palace Car Company vs. Missouri Pacific Railway Company*, 115 U. S., 587. In that case the Missouri Pacific Company had a contract with the Pullman Company to install the cars of the Pullman Company on all roads "which it now controls, or may hereafter control, by ownership, lease or otherwise." The Missouri Pacific Company having acquired more than a majority of the stock of the St. Louis, Iron Mountain and Southern Railway Company, the Pullman Company claimed the right under this contract, to

operate its cars over the lines of the St. Louis, Iron Mountain and Southern Railway Company. It was held, however, that the ownership of the stock of that road by the Missouri Pacific Company did not operate to consolidate the companies, or to bring them within the terms of the contract. The opinion declares at p. 596:

> "We are also of opinion that the railroad of the St. Louis, Iron Mountain and Southern Company is not controlled by the present Missouri Pacific Company in such a way as to require that Company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old, were that company still in existence, and standing in the place of the new. Confessedly the St. Louis, Iron Mountain and Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers, and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board, when elected, has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two

roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific."

The decision in *Peterson vs. C. R. I. & P. Ry. Co.*, 205 U. S., 364, is equally decisive. In that case, it was sought to hold the Chicago, Rock Island & Pacific Railway Company on service had upon certain agents of the Chicago, Rock Island & Gulf Railway Company in the State of Texas. It was insisted that the relationship between these companies was so close as to make the latter the agent of the former, and a part and parcel thereof. The stock of the Chicago, Rock Island & Gulf was owned and held by the former road; many of the controlling and operating officers of the companies were the same; the Boards of Directors in both companies were controlled in the same interest, and the corporate relations of the two companies were as close as it is possible to conceive. Trains passed from the rails of one company onto the other, the same crews operating them on the rails of each company. The Supreme Court, nevertheless, held that the two companies were separate legal entities, and that the Chicago, Rock Island &

Gulf was not a part of the Chicago, Rock Island & Pacific Company, nor its agent. At page 391 the Court says:

> "It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave the Pacific Company the power to control the road by the election of the directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; but this power does not make it the company transacting the local business. This record discloses that the officers and agents of the Gulf Company control its management. The fact that the Pacific Company owns the controlling amounts of the stock of the Gulf Company, and has thus the power to change the management, does not give it present control of the corporate property and business."

And again, page 393:

> "So, in the case at bar, notwithstanding the ownership of the stock in the Gulf Company by the Pacific Company, the former

company transacts the business in Texas, and is a separate legal entity, authorized under the laws of Texas, and legitimately carrying on business there. There is no evidence that the Pacific Company may not lawfully hold the stock of the Gulf Company, and, under the statute of Illinois, it seems to be authorized so to do. * * * It is true that the Pacific Company loaned the money to build the road of the Texas Company, predecessor of the Gulf Company, but, as was well observed by Justice JACKSON in *U. S. vs. American Bell Telephone Company*, 29 Fed. Rep., 17: 'For one person to supply means for another to do business on is not the doing of that business by the former.' The conduct and control of the business in Texas was entrusted to the Gulf Company. As the largest stockholder, the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs, and carry on its own business. This separate corporation had its own officers, a large amount of its own property was responsible for its contracts, and to persons with whom it dealt."

The very recent case of *United States vs. Delaware & Hudson Company*, 213 U. S., 366,

involving the construction of the "commodities clause" of the Interstate Commerce Act, would seem to be absolutely conclusive upon this proposition. The clause under construction in that case is as follows (page 403):

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia, to any other state, territory or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Certain railway companies, authorized under their charter so to do, owned stock in coal companies, and transported the products of such companies in their capacities as common carrier. The government conceived this to be a violation of this clause of the interstate commerce act, and brought suit by injunction to test the question.

The court held that the ownership of stock in a coal producing company did not give the carrier any interest in the coal, direct or indirect. It says at p. 413 :

> " It remains to determine the nature and character of the interest embraced in the words, ' in which it is interested directly or indirectly.' The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a *bona fide* corporation, in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and, therefore, does exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured,

mined, produced or owned by a distinct corporation, merely because of a stock ownership of the carrier. *Pullman Palace Car Company vs. Missouri Pacific R. R.*, 115 U. S., 587; *Conly vs. Mathieson Alkali Works*, 190 U. S., 406, and that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded, in the argument for the government, that if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity, simply because it has been manufactured, mined or produced, or is owned by a corporation in which the carrier is a stockholder."

The decision of the court, therefore, is clearly to the effect that, although a railway company is the owner of stock in a coal producing company, it has no interest, direct or indirect, in the property of the latter. The case at bar is far more remote in its application than either of the cases cited. In this case, the Galveston, Harrisburg and San Antonio Railway Company has no interest in the stock of the wharf company, nor has that company any interest in the stock of the carrier company. The Southern Pacific

Company, a Kentucky corporation, with full power under its charter to own stock in these companies, happens to own a controlling interest in each, and it is submitted that this ownership in no wise effects such a consolidation as would bring the wharf company under the jurisdiction of the Interstate Commerce Commission as an appurtenance to a common carrier.

To the same effect is *White vs. Pecos L. & W. Co.*, 18 Texas Civil Appeals, 634.

The case of *Exchange Bank of Macon vs. Macon Construction Company*, 97 Ga., 1, is very much in point. The court, quoting from 115 U. S., 587, with approval, says at page 5:

> "Every corporation is a person—artificial, it is true, but, nevertheless, a distinct legal entity. Neither a portion nor all of the natural persons who compose a corporation or who own its stock and control its affairs are the corporation itself, and when a single individual composes a corporation, he is not himself the corporation. In such case, the man is one person created by the Almighty, and the corporation is another person created by the law. It makes no difference in principle whether the sole owner of the stock of a corporation is a man or another corporation. The corporation holding such

stock is as distinct from the corporation whose stock is so owned as the man is from the corporation of which he is the sole member. . . . We conclude what we have to say on this branch of the case by making the following pertinent extracts from that most excellent work, *Cook on Stock and Stockholders and Corporation Law:*

'A corporation is an entity, and exists separately from its officers and stockholders, and the inclination of some writers to assimilate a corporation, as nearly as possible to a partnership, and to apply to the former the rules applicable to the latter, leads only to confusion, and is contrary to the law. The difference between a corporation and a partnership, and the advantages of a corporation over a partnership as a means of doing business, are very marked, and should not be limited by construction. A corporation is an entity, and exists irrespective of the persons who own all of its stock. The fact that one person owns all the stock does not make him and the corporation one and the same person, although one railroad corporation owns all the stock of another railroad corporation, yet the separate existence of the two corporations continues, and they are not thereby merged.'"

The same holding is made by the Supreme Court of Kansas in *A. T. & S. F. R. R. Co. vs. Cochran*, 43 Kans., 225. This case also cites with approval the decision in 115 U. S., 587, and says at p. 236:

> " The rights and powers of the Atchison road were those of a stockholder only. Therefore, the Atchison road was not the Southern Kansas corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property of the Southern Kansas. Under the laws of this State, a railroad company has a lawful right to purchase and hold stock of any other railroad company, the line of whose railroad, constructed or being constructed, connects with its own. * * * The stockholders of a railroad company may be said, in a certain sense, to control, direct and manage the road; but an action for the negligence of the officers, agents or employes of the railroad company must be brought against the company, not against the stockholders. Therefore, as the rights and powers of the Atchison road in the Southern Kansas Railroad Company were those of a stockholder only, the Atchison Company is not responsible for the wrong-

ful acts of omission or commission of the Southern Kansas road. As the rights and powers of the Atchison road in the Southern Kansas were those of a stockholder only, the instructions of the court that the jury might find from the testimony that the Southern Kansas Railroad Company, for all practical purposes, was managed, controlled and operated by the Atchison Company was misleading."

These cases would seem to be absolutely conclusive upon the proposition that the ownership of the stock of the Galveston, Harrisburg and San Antonio Railway Company and the Terminal Company does not in any manner whatsoever effect an amalgamation of these companies in any legal sense, nor is there anything in the testimony which would lead to a different result. Each has its own separate corporate organization, absolutely independent of the other. The Galveston, Harrisburg and San Antonio Railway Company has its separate and adequate freight and passenger terminals in the City of Galveston, in nowise connected with the properties of the wharf company. That company owns no motive power, operates no cars, issues no bills of lading, publishes no tariff, and

does not undertake in any manner, directly or indirectly, to perform any service of a common carrier. It owns certain railway tracks leading through its premises down to the piers. Over these tracks the cars of all of the railways entering Galveston are switched for the reception and delivery of goods on the piers. For the use of these tracks, a charge of $1.75 per car is made, and there is absolutely nothing shown in the records that would impress, or tend to impress, the Southern Pacific Terminal Company with the character of a common carrier. That a wharf company is not subject to the jurisdiction of the Interstate Commerce Commission ought not to be a subject of argument. So far as counsel are advised, notwithstanding the thousands of miles of water front and numberless wharves and wharf companies in the United States, we know of no case where the Interstate Commerce Commission has undertaken to stretch its jurisdiction to this extent. Its own decisions are directly against such an assumption of authority. In the case of *Cattle Raisers' Association vs. Ft. Worth & Denver City Railway Company*, 7 I. C. R., 513, it appears that the Union Stock Yards and Transit Company of Chicago imposed a trackage charge for the use

of its tracks in the transportation of live stock to and from the stock yards, and the question arose whether, in the transportation of live stock, the Stock Yards Company was a common carrier. The Commission found that it was not, and that, therefore, it was not subject to the jurisdiction of the Interstate Commerce Commission. It said (p. 536):

> "That company is a corporation under the laws of the State of Illinois. By the act of incorporation it is authorized to construct stockyards, connect those yards with the various lines of railway entering the City of Chicago, and to either lease such connecting tracks for the purpose of the transportation of live stock and other freight between the various lines of railway and the stockyards, or to so transport live stock and other freight over such connecting lines itself. In accordance with this act of incorporation, the company has constructed its stockyards and its lines of railway connecting the tracks of the various defendants with those of the stockyards. It may, by virtue of its corporate power, either lease these connecting tracks, or furnish the motive power and conduct the transportation of various kinds of freight over these tracks to and from the stockyards. Originally it leased the right

in all cases, receiving in the case of dead freight a trackage charge, and imposing in the case of live stock no charge whatever. Subsequently it elected to transport the dead freight itself, and at the present time it does furnish its own motive power and its own crews, and haul dead freight from the various lines of the defendants to the stockyards and back. With reference to this freight, it is undoubtedly a common carrier. In respect to live stock, however, it imposes a trackage charge, and defendants, in all cases, by their own motive power, and with their own crews, transport the cars to and from the stockyards. Apparently at the stockyards the work of unloading is done by the Stockyards & Transit Company.

"Upon this state of facts, it is difficult to see how the Union Stockyards & Transit Company can be held subject to the act in this proceeding. The act provides that it shall apply 'to any common carrier or carriers engaged in the transportation of passengers or property.' The Union Stockyards & Transit Company is not in any sense of that word a carrier as to this freight. It publishes no tariff; it issues no way-bill; it has nothing to do with the transportation of this property. It possesses no incident and discharges no function of a common carrier in respect to this traffic."

In point also is the case of *Kentucky & Indiana Bridge Company vs. L. & N. R. R. Co.*, 37 Fed. Rep., 567. The bridge company owned a bridge between Kentucky and Indiana. Charters were granted by both States, and the corporations were consolidated. The Kentucky charter provided that the bridge company might lay a single track or double track on its bridge for railroad cars; that it might run a line of railroads to the City of Louisville upon such terms as might be prescribed by ordinance, to connect with any railroad, transfer company or depot, and should have the right to lease such connecting line or lines, and might charge reasonable compensation for the same. The charter further provided (p. 596):

> "Said corporation may contract with any railroad company, in or out of this State, for the use of said bridge by its cars and engines, or for other purposes; and any railroad or street railway, or person, or municipal corporation, in or out of this State, may subscribe for the capital stock of said corporation, upon any terms or conditions agreed upon, and may make such contracts or agreements as may be deemed expedient for the use, management or control of said bridge. Said Kentucky & Indiana Bridge

Company is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities, and it may construct such line or lines in the County of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots. Said Kentucky & Indiana Bridge Company is authorized to contract with any company organized under the laws of the State of Kentucky for the erection of said bridge, and the construction of any terminal lines connecting with it, and to pay for the same in bonds or stock of said company, at such price as may be agreed upon. Said Kentucky & Indiana Bridge Company is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in the said State of Indiana, which may be necessary for completing its terminal facilities; or it may extend such branch lines through the City of New Albany, State of Indiana; and it may construct such line or lines in the County of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots. Said Kentucky and Indiana Bridge Company is authorized to connect its line with the line of the Short Route Trans-

fer Company, and for that purpose may cross other railway or bridge lines, passing either under or over the same. The said company is also authorized to cross the land of other railway or bridge companies, in case it may be necessary, in running its connecting lines. The Kentucky and Indiana Bridge Company shall have the right and power to condemn any land in the City of Louisville, or County of Jefferson, State of Kentucky, that may be necessary or proper for the construction or maintenance of any line of railway which said company is authorized by its charter, or amendment, or amendments thereto, to construct, maintain or operate."

The Indiana charter recites that the object and purpose of said company was to construct own and operate a bridge from a point in said City of New Albany, across the Ohio River, to a point in the City of Louisville, for both railway and common roadway purposes. The Company was also empowered by the Indiana statute to construct a railway with one or more tracks from said bridge and embankment, and to connect the same with other railway tracks, and to fix the rates of toll for persons and property passing over said bridge, and tracks connected there-

with, whether in cars propelled by steam or otherwise. This bridge company entered into a contract with the railway company, in which it was provided, among other things, that it would keep its bridges, approaches and lines of railway in repair at its own expense; and it agreed to establish, provide and maintain tracks connecting its present tracks with the tracks of all other railways then seeking New Albany, within a reasonable time, either directly or through the use of the other railway lines, and to switch the cars of the railway company over such connecting track at a switching charge of $1.00 per car; also to transfer cars from the railway company's transfer yard south of Bank Street, in Louisville, to the Louisville and Nashville Railroad, or the Chesapeake, Ohio and Southwestern Railroad, at the same rate per car. Under proper ordinances from the City of Louisville, the Bridge Company could build a track to connect with the tracks of the Louisville and Nashville Railroad Company. This bridge company owned no freight cars of its own, issued no bills of lading, and made no freight charges. It, however, solicited freight for railroad companies over whose lines freight was to go, and transferred such cars over its bridge, delivering them to the railroad companies fur-

nishing the same, and receiving for its service its regular bridge toll.

It was held by the court that the bridge company was not a common carrier; that its object in making itself a soliciting agent for the railroads and securing the freight was to obtain toll for the use of its bridge, and did not constitute it a common carrier. It was held that as to freight thus handled it was not such carrier, and that the act to regulate commerce did not apply to it. The court further held that its charter powers fell short of making it a common carrier. They say:

> "That petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of Section One of the act to regulate commerce, and that in respect to freight which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection, it is only a transfer company or agency engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line or connection to another. Little,

if anything, can be added to what has been so well said in the dissenting report of Mr. Commissioner Schoonmaker, on the subject of petitioner's legal status and character, under its charter and articles of association, the provisions of which are fully set out in the foregoing statement of facts. We concur in the views expressed and the conclusions reached by him, that petitioner's corporate powers fall short of making it a common carrier of property, having the right to engage in the transportation of freight for hire. The charter powers and franchises conferred upon petitioner make its bridge and approaches thereto, such as it had authority to construct, a public thoroughfare or highway for the use of which by railroads, or street cars, wagons, vehicles, animals and foot passengers, it was authorized to charge 'reasonable tolls,' for the collection of which suitable toll-gates could be established. The word 'toll' is, no doubt, sometimes employed in railroad charters to express the charge for transportation, rather than for the use of the structure over which such transportation may be conducted, but it is manifestly not used in that sense when applied to a bridge built and maintained for use by the public, or others engaged in transport-

ing property. The franchises and powers conferred upon petitioner of building, maintaining and operating its bridge and approaches, designated as its 'terminal facilities,' do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway, open to the use of others, common carriers and private parties, upon making compensation therefor in the shape of 'reasonable tolls.' These 'tolls' which petitioner is authorized to charge for the use of its bridge, are not applicable to, nor demandable for, any transportation service it may perform or be permitted to render. The word, as used in its charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge or highway, established and maintained for use by common carriers and others, upon paying compensation for such use in the way of 'tolls,' however graduated, and that of an incorporated common carrier engaged in transporting property for hire, is well defined."

To the same effect is the case of *Cotting vs. Kansas City Stock Yards Co.*, 82 Fed. Rep., 839.

THIRD POINT.

The lease contract held to be unlawful does not, under the facts proven, constitute an unlawful or undue preference under the Interstate Commerce Act.

The court is asked to hold that the lease contract with Young is unlawful *per se*, and *ex proprio vigore* operates an unlawful preference. The only testimony in the record which even tends to show that Young's lease might operate as an illegal preference to him is the following:

> "Some of the cotton seed cake producers at interior mills in the State complain that Young is able to dominate the Texas market, and that his method of conducting business at Galveston enables him to command the foreign trade, and may become a detriment to the cotton seed cake and meal industry, in that Young might acquire a monopoly. Others entertain a contrary opinion. They all agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired, it would be of great benefit to the cotton seed industry." (Agreed Statement of Facts, Record, p. 134.)

And again, on page 134:

> "On the present constructed docks of the Galveston Wharf Company and the Terminal Company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young."

It appears (Record, p. 132, 133) that Young has ample capital for the transaction of a large business, and numerous correspondents in Europe, where the great bulk of cotton seed meal and cake is sold, that he pays the highest market prices for cotton seed cake, and often undersells his competitors in the European market. There is nothing in the testimony to show that the other exporters mentioned needed or desired or made any application in good faith for a similar contract as that made to Young, and it is shown by the record that the Southern Pacific Terminal Company has ample unoccupied space for the erection of similar facilities, and that west of its property and east of the land owned by the Galveston Wharf Company there is a frontage on the channel of approximately one mile available for such purposes, and that there is now an ap-

propriation by the general government available when the needs of commerce require the same.

It is true that the Commission, in its opinion (Record, p. 87), says:

> "Young is exempt from demurrage charges which accrue after the product remains ten days in the cars or on the wharves."

This statement in the opinion is not evidence, but we call the attention of the court thereto lest it may be misled. It is an inadvertence upon the part of the Commission. If such a privilege were granted to Young, it would have no connection with the lease contract made. Demurrage charges accrue to the delivering railway carrier, and if the delivering carrier did not collect these charges, its acts would be a departure from a regularly published schedule of rates, which would, of course, be a violation of the Interstate Commerce Law, and also illegal, as discriminatory against others. This, however, would have no connection with the contract before the Commission and before the court. No such charge was made or passed upon by the Commission. As a matter of fact, however, there is nothing in the record to justify this statement. The Galveston freight intended for

local consumption is granted forty-eight hours free time to unload from the cars. If intended for export, whether brought to Galveston on local bills or through bills, it is allowed ten days free time. Young, by reason of the prompt methods adopted by him for unloading his traffic, and by reason of the warehousing facilities with which he has provided himself, is able to unload the product within the ten days, and hence does not incur the penalties of demurrage charges (Record, p. 132).

This is not, however, because any special privilege is granted to him in that particular, but because he promptly unloads his products. The record discloses no fact which would justify the conclusion that any party has been subjected to any undue or unfair advantage by reason of this lease contract. The decisions above referred to clearly hold that a common carrier has the right to lease or sell property which it owns in fee for the erection of warehouses, elevators, etc., and it is so universal a business method all over the United States that the court may take judicial knowledge thereof. The decision of the Interstate Commerce Commission in this case will revolutionize industrial methods in this country, and we are justified in

declaring, under the decisions above referred to, that if the Southern Pacific Terminal Company, instead of being a wharf company, was a common carrier, it would be entirely justified in making the lease under consideration here. To state the proposition more clearly: Under the decisions of the State of Texas and of the Supreme Court of the United States, if the Galveston, Harrisburg and San Antonio Railway Company owned the properties of the wharf company entirely, and that company were eliminated from this case, it would have the right to lease or sell its unused property, which it owns in fee, to Young, to be used by him as a warehouse, a manufacturing plant or a wharf, public or private, subject only to the limitation imposed by the general law that his use of the property should not interfere with the use of the adjacent navigable waters. In this connection, see also *Butchers and Drovers Stock Yards Co. vs. Louisville and Nashville R. R. Co.*, 67 Fed. Rep., 35; *Ilwaco Railway & Navigation Company vs. Oregon Short Line & U. N. Ry. Co.*, 57 Fed. Rep., 673.

FOURTH POINT.

The order of the Commission transcends its jurisdiction, in that it regulates commerce purely state and intrastate, and also purely foreign commerce, neither of which is subject to its authority.

The evidence shows that the cake and meal purchased by Young is bought in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas. It is purchased and paid for by him on his own account, and is shipped to him on bills of lading and way-bills showing the point of origin in said States, and destination at Galveston, where it is delivered to him, he paying the freight. There is no consumption of cotton seed meal and cake at Galveston, and said Young purchases the cake in order that he may export it. He makes sales of cotton seed cake and meal to foreign countries, sometimes for immediate delivery, and sometimes for future delivery, and irrespective of whether he has the product on hand or not at Galveston at the time he makes the sale. At times he has on hand at Galveston more meal than is sufficient to fill his foreign orders, and at other times he has less

than is necessary to fill these foreign orders, and must fill them from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston, it is ground into meal and sacked by Young, and the meal thus ground, and such meal as has been bought outside of Galveston, is used by him in filling such sales as have been made, and such as may be made in the future. At Galveston, when he makes shipments to his customers, he takes out ship's bill of lading, made to his order (Record, pp. 132–135). Frequently he charters his own ships, and at all times he delivers the goods direct from his premises into shipshold. It is thus apparent that Young makes no shipments on through bills of lading. He purchases on his own account, and the traffic is delivered to him at the leased premises in Galveston. The transit is there absolutely ended. This is a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export. It is absolutely clear that as to the far greater part of this business, the same originating in Texas, and which is shipped from a point wholly within the State of Texas to another point wholly within the State of Texas, it is intra-state business, and

cannot be subject to the jurisdiction of the Interstate Commerce Commission.

G. C. & S. F. Ry. Co. vs. State of Texas, 204 U. S., 403.
Coe vs. Errol, 116 U. S., 517.

In the recent case of *Texas & New Orleans Railroad Company vs. Sabine Tram Company*, 121 S. W., 251, shipments of lumber were made from Ruliff, a point within the State of Texas, to the port of Sabine, in said State. This traffic was of a character specially designed for export, was purchased for that purpose, and ships had already been chartered to carry it to Europe prior to its arrival at the port. It was carried in continuous transit from point of origin to the slips at the wharves, where it was unloaded for immediate delivery to the ship which was to transport it to Europe. There was in effect at the time an export rate on such traffic, which was higher than the rate prescribed for local movements from the point of origin to the port. The carrier, conceiving this to be foreign commerce, applied the export rate, and the Sabine Tram Company, which had sold the lumber to the exporter, brought suit for overcharges and for the penalties prescribed by the State statute. The shipment moved under a local bill of lading

and was what is termed a shipper's order notify bill; that is to say, it was shipped from Ruliff to Sabine, consigned to the order of the Sabine Tram Company, the owner of the lumber, notify W. A. Powell & Company, Limited, the exporters. The Court of Civil Appeals for the Galveston district held, evidently with some reluctance, that, under the decision of the Supreme Court of the United States in *G. C. & S. F. Ry. Co. vs. State of Texas*, 204 U. S., 403, it was compelled to hold that the shipment was purely intra-state, and subject only to the laws of the State of Texas and the rules and regulations of the Railroad Commission of that State, and that the regularly filed and published export rate did not apply. In other words, that the Interstate Commerce Commission had no jurisdiction in the premises.

Other decisions might be quoted, as for instance, *Augusta Brokerage Company vs. Central of Georgia Railway Company*, 5 Ga. App. R., 187, where it was held by the Georgia Court of Appeals that the fact that the owner of merchandise which is offered to a carrier for transportation from one point to another in the same State intends to have it further transported by a second carrier into another State, does not make such first transportation interstate commerce.

even though the first carrier may be informed of the ultimate destination of the merchandise. The court says :

> " The plaintiffs were avowedly buyers of cotton seed for South Carolina parties. It is admitted that the cotton seed they bought was intended ultimately to be shipped to South Carolina and presumably their request that this car be placed on the side-track at their warehouse was intended in some way to facilitate shipment to its ultimate destination in South Carolina. But the intention of the consignee as to the future disposition of his property by shipping it over another line, under a new bill of lading, into another state, cannot change an intra-state shipment into an interstate shipment. The law is not dealing with the intention of the consignee, but solely with the relation of the railroad to the freight transported. A seller in Georgia might conduct with a buyer in South Carolina an interstate business, as between themselves, but, if the railroad refuses to carry beyond its own line, and compels unloading at its terminus in Georgia, such business, in its relation to the railroad, is wholly intra-state."

The instant case is far stronger than that just above cited. At no point in the transit of Young's products which originated in Texas does the jurisdiction of the Interstate Commerce Commission ever attach. Under the law, as construed by the Supreme Court of the United States and of the appellate courts of Texas, Young clearly has the right to buy cotton seed cake within the State of Texas and ship it to his warehouse on the premises leased from the wharf company. This is a purely intrastate and domestic shipment. The State rates apply. If the railway carrier transporting this shipment from a Texas point on a local bill to Young had undertaken to apply a different rate from that prescribed by the Texas Railroad Commission such carrier would have been subject, not only to a claim for the difference in the rate, but to severe penalties under the Texas law for a non-observance of the orders of the Texas Railroad Commission, and for extortion, in case the rate collected was higher than that prescribed by the Commission. The carrier could not say that this traffic is export traffic because it ultimately moved to European points. The reply is promptly made that the intention of Young to ulti-

mately sell in Europe does not make the traffic foreign. When the transit begins at the intrastate point, and when it ends at Galveston, it has not even been sold in Europe. Young, as any other manufacturer or owner, buys his stock in the interior of Texas, warehouses it at his depot on the leased premises, and there manufactures it, changing its form. Up to this time, therefore, it is certainly State commerce, over which the Interstate Commerce Commission has no jurisdiction. It is then delivered by Young from his warehouse into ships-hold for transport direct to Europe. Certainly, over this part of the transit, the Interstate Commerce Commission has no jurisdiction. It has itself so held in the *Cosmopolitan Shipping Co. vs. Hamburg American Packet Co.*, 13 I. C. R., p. 266. In that case the complainants alleged that the defendants transported traffic on through bills from points within the United States to European points, and that they had entered into pooling arrangements which constituted a monopoly and resulted in unjust discriminations in violation of the Interstate Commerce Act. Commissioner LANE, delivering the opinion of the Commission, said at page 279:

> "Therefore, from the language of the act itself, and the evident purpose of Congress

> in passing the act, and from the decisions of the courts, meagre and generally unsatisfactory as they are, we are inevitably drawn to the conclusion that this Commission has no jurisdiction over the Trans-Atlantic Steamship Lines herein involved, even though they may be parties to a through arrangement for continuous transportation in connection with a railroad within the United States."

In the case before the court there is no shipment on through bills from a point within the United States to the European point. The greater part of the traffic is confined to products which move from a point within the State of Texas to a point within the same State upon a local bill. This is intrastate and domestic traffic. When it leaves the warehouse of Young it goes without the interposition of any common carrier into the hold of a ship direct to Europe. Over this transit the Interstate Commerce Commission has no jurisdiction. At what point, then, does its jurisdiction attach? The order of the Interstate Commerce Commission, however, holds that the contract is unlawful *per se*, and orders the Southern Pacific Terminal Company practically to cancel its lease, render useless its investment

of $65,000, and deprives Young of his investment of $50,000 in his manufacturing machinery located upon the leased premises. The order, therefore. is void, at least in so far as it applies to the greater part of the traffic, and since the court cannot, under the decisions, enforce a part of the order while annulling the remainder, the entire order must be enjoined.

FIFTH POINT.

It is respectfully submitted that the decree of the Circuit Court of the United States for the Southern District of Texas be reversed, and that judgment be entered, cancelling and annulling the order of the Interstate Commerce Commission, herein complained of, and in all things enjoining the enforcement thereof.

MAXWELL EVARTS,
F. C. DILLARD,
H. M. GARWOOD,
Of Counsel for Appellants.

APPENDIX.

CHAPTER XCIV., ACTS TWENTY-SIXTH LEGISLATURE OF TEXAS, PAGE 162 (1899).

S. B. No. 228.

An act ratifying and confirming an ordinance passed by the City Council of the City of Galveston on the 4th day of February, 1899, entitled 'An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the City of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shore of Galveston Bay within the corporate limits of the City of Galveston upon certain specified conditions,' and conditionally relinquishing any claim the State of Texas may have to part of the property therein described.

WHEREAS, the city council of the city of Galveston, on the fourth day of February, 1899, passed an ordinance reading as follows:

An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the city of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shores of Galveston Bay within the corporate limits of the city of Galveston upon certain specified conditions.

WHEREAS, Collis P. Huntington has contracted for the purchase of the property herein-

after more particularly referred to, subject to the approval of the title by counsel, and

WHEREAS, one of the conditions of such purchase is that when the city of Galveston shall have closed the streets, avenues and alleys, if any, northerly from Avenue B, in the city of Galveston, and lying between the westerly line of block 700 and its prolongation in a northerly direction, and the westerly line of block 710 and its prolongation in a northerly direction and when through and by means of such acts of Congress, acts of the Legislature of the State of Texas, and ordinances and conveyances from the city of Galveston, if any, as may be requisite for the purpose, the right has been secured to the said C. P. Huntington, or his heirs or assigns, to construct piers as he or they may from time to time determine, northerly from said Avenue B, and from points between said westerly line of block 700 and said westerly line of block 710, to the harbor line of 1897, and to dredge between and on the sides of such piers and northerly and northeasterly therefrom and from said harbor line of 1897, so as to permit the securing of at least twenty-five feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom, and so as to secure a connection by a continuous channel twenty-five feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least five hundred feet in length and fifty feet beam, and drawing at least twenty-five feet of water, to conveniently go at mean low water from the waters of the Gulf of Mexico to and lie alongside said piers, then and in that

event the said C. P. Huntington, his heirs or assigns, will within six months thereafter commence the construction of terminal facilities upon said property for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, and will, within two years thereafter, expend at least the sum of one hundred and fifty thousand dollars ($150,000.00) in the construction of such piers and such dredging and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns; and,

WHEREAS, no streets, avenues or alleys have ever been heretofore opened, constructed or utilized on or through the said property above referred to, and hereinafter more particularly described, and no streets, avenues or alleys have ever been heretofore laid out or designated or recognized by the city of Galveston, or the owners of property northerly of the north line of said blocks from 700 to 710, inclusive, but the said property, or the greater part thereof, is and has ever been under the waters of Galveston Bay; and,

Whereas, it is greatly to the interest of the city of Galveston and its inhabitants that the work and improvements contemplated by said C. P. Huntington and his assigns should be performed, and it is necessary to said work and improvements and to the proper utility of said property for such purposes, that there should be no streets, avenues or alleys opened through and across said property;

Now therefore, be it ordained by the city council of the city of Galveston, as follows:

SECTION 1. That any or all streets, avenues or alleys, if any, heretofore opened, laid out, or in any manner designated upon, through or across the following described property in the city of Galveston, to-wit:

Beginning at the southwesterly corner of block 710, thence along the westerly line of block 710 and the prolongation thereof in a straight line in a northerly direction 2860 feet, more or less, to the six feet contour in Galveston Bay; thence in an easterly direction along said contour to a point thereon where it would be intersected by the prolongation of the westerly line of block 700, if continued in a straight line; thence in a southerly direction along said prolongation thereof and the westerly line of block 700 to the southwesterly corner of said block 700; thence in a westerly direction along Avenue B, 3800 feet, more or less, to the place of beginning; the same including all of blocks 701 to 710, both inclusive, together with the land and lands under water lying northerly of said Avenue B, between the westerly line of said block 700 and the prolongation thereof above mentioned, and the westerly line of said block 710 and the prolongation thereof above mentioned to the southerly boundary line of the six feet contour above referred to; and also upon, through or across the lands under water and property lying between the property above described and the harbor line of 1897, or the harbor line as it may be changed from time to time, be and the same

are each and all hereby perpetually abandoned, discontinued and closed.

SECTION 2. That said Collis P. Huntington, his heirs or assigns, be and they are hereby authorized, empowered and granted the right perpetually to construct and maintain piers as he or they may from time to time determine upon the property described by metes and bounds in the preceding section hereof, and upon the property lying and situated between the same and the harbor line of 1897, and to dredge between and on the sides of such piers and northerly and northeasterly therefrom and from said harbor line of 1897, so as to permit the securing of at least twenty-five feet of water at mean low water between and beside such piers, and northerly and northeasterly therefrom, and so as to secure a connection by a continuous channel twenty-five feet in depth at mean low water from said piers to the Gulf of Mexico, and to permit steamers of at least five hundred feet in length and fifty feet beam, and drawing at least twenty-five feet of water, to conveniently go at mean low water from the waters of the Gulf of Mexico to and lie alongside of said piers, and to maintain the same; and to construct and maintain upon said property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns.

SECTION 3. The grant hereby made and all of the rights and privileges hereby conferred are subject to and upon the following conditions, viz.:

FIRST. That the said C. P. Huntington, his

heirs or assigns, shall, within six months from the ratification and approval of this ordinance and the confirmation of the grant made and the rights conferred by it by the Legislature of the State of Texas, and the passage of such acts of Congress, if any, as may be requisite for the purpose, commence the construction of terminal facilities upon the property hereinbefore referred to for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, and shall, within two years thereafter, expend at least the sum of one hundred and fifty thousand dollars ($150,000) in the construction of such piers and such dredging, and in the construction of depots and other terminal facilities for what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns.

SECOND. That if the said C. P. Huntington, his heirs or assigns, shall charge wharfage for the use of such piers or other facilities upon said property, except in so far as the wharf service may be covered by the freight rate, all such wharfage shall be subject to the regulations of the Railroad Commission of Texas; but this shall not be so construed as to permit or allow any other person or corporation to use said property, or any portion thereof, without the consent of said C. P. Huntington, his heirs or assigns, owning the same at the time.

And whereas, it is greatly to the interest of the public, that the property described in Section 1 of said ordinance should be developed for shipping and transportation purposes, and that

the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and State, and to utilize, as far as practicable, the deep water at said port secured by the expenditure of large sums of money by the government of the United States.

NOW THEREFORE,

Be it enacted by the Legislature of the State of Texas,

SEC. 1. That the ordinance passed by the city council of Galveston on the fourth day of February, 1899, entitled "An ordinance abandoning, discontinuing and closing certain streets, avenues and alleys of the city of Galveston, and authorizing and empowering Collis P. Huntington, his heirs or assigns, perpetually to construct and maintain piers on the shores of Galveston Bay within the corporate limits of the city of Galveston, upon certain specified conditions," be and the same is hereby in all things authorized, ratified, approved and confirmed, except in so far as the provisions of said ordinance may be in conflict with the provisions of this act, and the State of Texas hereby relinquishes unto the said Collis P. Huntington, his heirs or assigns, whatever title or claim, if any, it may have in or to any portion of the flats or lands under water described in Section 1 of said ordinance, subject, however, to each and all the conditions set forth or contained in section three of said ordinance as above recited, and all other conditions contained in any part of this act, and upon the further condition, that if the said C. P. Huntington, his heirs or assigns, shall charge

wharfage for the use of such piers or other facilities upon said property, all such wharfage charges shall be subject to the regulation of the Railroad Commission of Texas; and thereupon the said C. P. Huntington, his heirs, assigns or successors, shall make an annual report to the said Railroad Commission of Texas, in such manner and on such forms and under such rules and regulations and at such time as the Railroad Commission may prescribe; but this shall not be so construed as to permit or allow any other person or corporation to use said property or any portion thereof, without the consent of said C. P. Huntington, his heirs or assigns, owning the same at the time, and upon the breach or violation of said conditions, or either of them, all the rights and powers hereby granted shall be revoked and shall revert to the State of Texas, and this act shall thereupon become and be null and void; provided further, that the system of railroad tracks that may be constructed by Collis P. Huntington, his heirs or assigns, on the property described and referred to in Section 1 of the above recited ordinance, shall connect with the track of any railroad company that may be built to the intersection of Forty-first street with the prolongation of Avenue A according to the map of the Galveston City Company; provided, that this shall not be construed as authorizing any person or corporation to use the tracks that may be constructed by the said Huntington, his heirs or assigns, on said property.

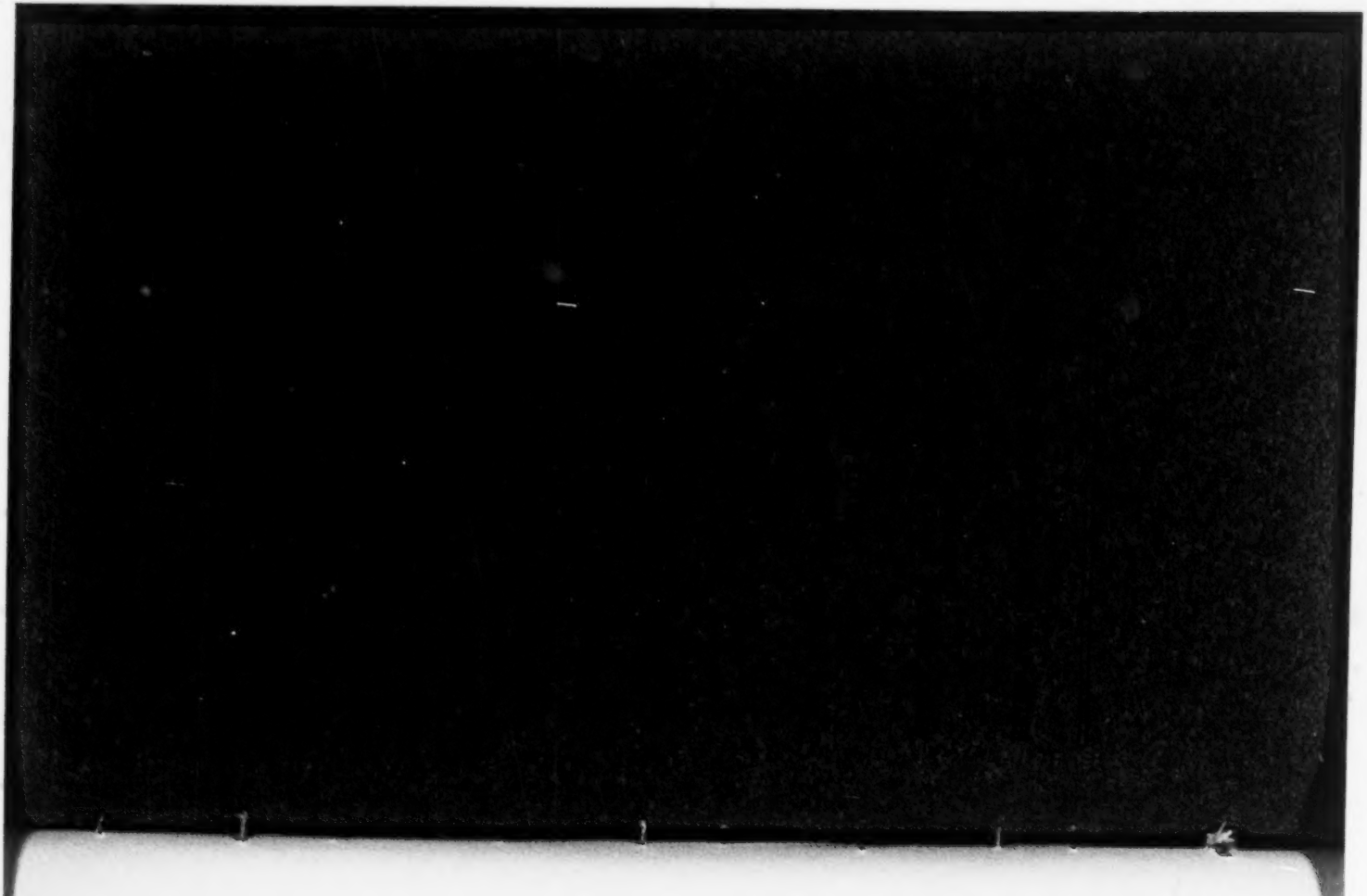
SEC. 2. The said Collis P. Huntington, his heirs or assigns, or the person, company or

corporation, owning or controlling the above described property and all the inprovements thereon situated shall never consolidate said property or the stock or franchise of such corporation as may own or control the same with the stock or property of the Galveston Wharf Company, or any company or corporation succeeding to the rights of the said Galveston Wharf Company, nor shall the owner of said property enter into any agreemeut with the Galveston Wharf Company, its successors or assigns, or any other Wharf Company which may now exist or which may be hereafter organized, by which the wharf or other terminal charges shall be regulated or fixed, and this inhibition upon the said Collis P. Huntington, his heirs or assigns, or the person, company or corporation owning or controlling the above described property and all improvements thereon situated shall also apply to the property now owned by the Gulf, Colorado & Santa Fe Railway Company between Fourth and Tenth streets, as shown by the Galveston City Company's map of the said city of Galveston. Nor shall any person owning or holding any interest in the form of stock or otherwise, in the property hereinbefore described, own or hold any interest, in the form of stock or otherwise in the wharf or bay frontage between Fourth and Forty-first streets, as now shown by the Galveston City Company's map of the said City of Galveston, and all sales, conveyances and transfers of whatsoever character in violation of this section shall be null and void; the object of this section being to keep the control, ownership or

management, direct or indirect, of the property hereinbefore described, and the control, ownership or management of the wharf or bay frontage between the said Fourth and Forty-first streets entirely distinct and independent of each other. And no charter formed for the use, operation and management of the property hereinbefore described, shall be granted unto the said Collis P. Huntington, or his assigns, unless this section be incorporated therein and all certificates of stock that may be issued by the company formed for the use, operation or management of the property hereinbefore described shall also contain this section on the back thereof.

SEC. 3. That the near approach of the close of this session and the large amount of business remaining to be disposed of before the final adjournment, and the public benefit to be derived from the improvements contemplated by this act, create an imperative public necessity authorizing the suspension of the constitutional rule requiring bills to be read on three several days in each house, and a case of emergency that this act should take effect and be in force from its passage, and such rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted.

NOTE.—The enrolled bill shows that the foregoing act passed the Senate by vote, yeas 19, nays 3; and was reported to the House of Representatives, where it was amended and passed, vote not given; Senate concurred in House amendments, vote not given.) Approved May 1, 1899.



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

SOUTHERN PACIFIC TERMINAL COMPANY, Southern Pacific Company, and Galveston, Harrisburg & San Antonio Railway Company, appellants, *v.* THE INTERSTATE COMMERCE COMMISSION and E. H. Young.	No. 459
E. H. YOUNG, APPELLANT, *v.* THE INTERSTATE COMMERCE COMMISSION, Southern Pacific Terminal Company et al.	No. 460

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

These cases come to this court on appeal from a decree (Rec., 205) of the Circuit Court of the United States for the Southern District of Texas dismissing the bill of complaint of the Southern Pacific Terminal

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Company, Southern Pacific Company, and the Galveston, Harrisburg & San Antonio Railway Company against the Interstate Commerce Commission and E. H. Young, and dismissing, without prejudice, the cross bill of E. H. Young. The bill and cross bill challenged the validity of an order of the Interstate Commerce Commission with reference to discriminations in favor of E. H. Young in the matter of wharfage charges and privileges at Galveston, Tex. (Rec., 1, 30.)

The order of the Commission (Rec., 19) was that the companies above mentioned be required to cease and desist, on or before September 1, 1908, and for a period of not less than two years thereafter abstain from giving E. H. Young, a shipper of cotton-seed products through the port of Galveston, Tex., or to any other person, undue preferences and advantages which now accrue to the said Young through the failure of the companies to exact from said Young wharfage charges for the handling of cotton-seed cake and meal over the wharves, docks, and piers of the companies at Galveston, while at the same time exacting wharfage charges from other shippers of such products, and from giving said E. H. Young or any other person, for his exclusive use, space on the wharves of said companies at Galveston for use in storage and handling of cotton-seed meal and cake while contemporaneously refusing similar privileges to other shippers of the same products.

The order of the Interstate Commerce Commission complained of was made after hearing on the com-

plaint of Carl Eichenberg against Southern Pacific Company *et al.*, in which it was claimed that a certain contract made between the Southern Pacific Terminal Company and E. H. Young, an exporter of cotton-seed cake and meal, gave said Young undue and unreasonable preference and advantage over other exporters of such products from Galveston and elsewhere. By the contract Young secured, in consideration of his agreement to route all shipments of cotton seed or cotton-seed products purchased or shipped by him over the lines of the terminal company and its connections and an annual payment of $15,000, exclusive use of a certain part of the wharves of the terminal company at Galveston for use in the storage and handling of cotton-seed meal and cake, and was not required to pay the usual wharfage charges, whereas similar privileges for the use of space on the wharves was denied to other shippers of the same products, and the usual wharfage charges of 20 cents per ton was exacted from all shippers of cotton-seed cake and meal for handling same over the wharves of the terminal company.

After the entry of the order of the Commission a bill of complaint was filed in the Circuit Court of the United States for the Southern District of Texas by Southern Pacific Terminal Company et al. against the Interstate Commerce Commission and E. H. Young (Rec., 1), in which an injunction was sought against enforcement of the order and in which it was further prayed that if the order be found in any respect valid that its enforcement be enjoined so

far as it abrogated or modified the contract between the terminal company and Young or forbade the terminal company to lease any part of its piers to said Young or to permit Young to carry on his business on such piers, and in so far as it forbade Young to receive freight thereon or to ship it therefrom, and in so far as it forbade the terminal company to lease any part of one of its piers or other parts of its wharves not used in its business, and in so far as the said order interfered with the handling by Young on said wharves of freight or commerce wholly confined to the State of Texas; and, further, that if the order of the Commission be not set aside, but sustained, that the contract between the terminal company and Young be canceled and that Young be enjoined from enforcing the same in any way.

A hearing was had upon an application for a preliminary injunction, but such injunction was denied, and the order became effective. Thereafter the Commission filed a demurrer (Rec., 52) to the bill and cross bill and same was overruled (Rec., 59).

An answer asserting the validity of said order was filed by the Interstate Commerce Commission (Rec., 64), and E. H. Young also filed an answer (Rec., 26) alleging said order was invalid, and he also filed a cross bill (Rec., 29) in which he sought an injunction against the enforcement of the order of the Commission and in the alternative that the terminal company be required to furnish to other shippers of cotton-seed cake and meal, whose shipments are offered under substantially similar circumstances and

conditions, piers at Galveston, Tex., similar to the pier used by Young, and, further, that the terminal company be enjoined from making any wharfage charges against other shippers of cotton-seed cake and meal other and different from the rental paid by Young for the pier used by him.

Evidence before the Circuit Court upon the hearing was confined to an agreed statement of facts (Rec., 99), and, as stated above, the Circuit Court dismissed the bill of complaint and the cross bill of Young.

The appellants contend that the order of the Commission is invalid, and, further, that even if the order be valid, the Circuit Court erred in the relief granted. As the contentions of the appellants regarding the validity of the Commission's order involve three principal questions—first, whether the Southern Pacific Terminal Company is subject to the jurisdiction of the Interstate Commerce Commission; second, whether the Commission by its order assumed to regulate commerce not interstate; and, third, whether the contract between Young and the terminal company constituted an undue preference—we present the facts with special reference to these issues in the argument upon the merits hereafter.

ARGUMENT.

These appeals should be dismissed because the Commission's order has expired.

Before entering upon the argument upon the merits we desire to bring to the attention of the court the fact that the order of the Interstate Commerce Com-

mission has expired, and these cases have now become moot.

We have already noticed that the order of the Commission was to become effective September 1, 1908, and be maintained in effect for a period not to exceed two years, which would make the period expire September 1, 1910. The provisions of the statute applicable to the power of the Commission in making its orders are found in section 15, wherein it is provided: "All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and *shall continue in force for such period of time, not exceeding two years,* as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction." We here find Congress fixing the extreme limit during which any order of the Commission, except for the payment of money, shall remain in effect. When September 1, 1910, arrived the order expired. Nothing remains upon which the order could operate. No bond was required of anyone; no money was ordered paid by the Commission—in short, the rights of everyone under the statute now remain exactly as they were prior to the making of the order by the Commission.

Counsel in their "Notes of Argument" for appellants well recognize that there is valid ground for the claim by the Commission that this case should be dismissed for the reason that it is now only an abstract

proposition, because the order sought to be enjoined is no longer in effect. Appellants recognize "a well-established principle adopted by courts for their own protection that upon the happening of any event pending litigation which would render a decree ineffectual the case must be dismissed as presenting only a moot question." They cite one of the leading cases, *Mills* v. *Green* (159 U. S., 651), wherein Mr. Justice Gray, at page 653, said:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal.

Counsel, however, insists that the present case presents an exception to the general rule. Before taking up the suggestions as to why this case should be taken out of the general rule, we desire to call to the attention of the court the following cases, without quoting from but one or two of them:

> *Pennsylvania* v. *Wheeling & Bel. Bridge Co.* (18 How., 421).

San Mateo County v. *Southern Pac. Co.* (116 U. S., 138).

Little v. *Bowers* (134 U. S., 547).

California v. *San Pablo & Tulare R. R. Co.* (149 U. S., 308).

New Orleans Flour Inspectors v. *Glover* (160 U. S., 170).

Dinsmore v. *Southern Ex. Co. and Georgia R. R. Com.* (183 U. S., 115).

We should, perhaps, specifically call to the court's attention the fact that in the case last cited suit was brought in the Circuit Court of the United States for the Southern District of Georgia against the Southern Express Company and the railroad commission of the State of Georgia to prevent the express company from applying any of its moneys to meet the requirements of the war-revenue act of June 13, 1898, in relation to adhesive stamps to be placed upon bills of lading. The Circuit Court enjoined the railroad commission, and appeal was taken to the Circuit Court of Appeals, which reversed the decree and ordered the case to be dismissed. The case was then brought to this court and submitted on February 25, 1901. On the 2d of March, 1901, the Congress excluded express companies from the operation of the war-revenue act of 1898 on and after July 1, 1901. This court decided the case November 18, 1901, holding that no actual controversy then remained or could arise between the parties. We quote from the opinion, page 119:

> This change in the law renders it unnecessary to consider any of the important ques-

> tions determined in the Circuit Court and Circuit Court of Appeals under the act of 1898. The object of this suit was to prevent the enforcement of the order of the Railroad Commission based upon its construction of that act. But whatever might be now held as to the meaning and scope of the act of 1898 as applied to express companies, the amendatory statute of 1901, in declaring what companies, corporations and persons shall attach the required stamp to bills of lading, manifests, and receipts for goods or other property to be transported, distinctly excludes express companies. So that no actual controversy now remains or can arise between the parties. The plaintiffs do not need any relief, because the act of 1901 accomplishes the result they wished.

In the case of *Jones* v. *Montague* (194 U. S., 147) this court had before it a case of prohibition. There was a judgment by dismissal in the lower court. Thereafter, pending appeal to this court, the thing sought to be prohibited was done and could not be undone by any order of court. On the authority of *Mills* v. *Green, supra,* this court held that nothing remained but a moot case, and the writ of error was dismissed.

The final word of this court upon this question was pronounced in *Richardson* v. *McChesney,* No. 23, this term, in which the opinion was announced by Mr. Justice Lurton, November 28, 1910. We quote from that opinion:

> The matter which the defendant McChesney, as secretary of the Commonwealth of Ken-

> tucky, is to be prohibited from doing relates solely to an election to be held in November, 1908, and the thing which he is to be required to do relates only to the same election. The election to be affected by a decree, according to the prayer of the bill, has long since been held, and the Members of Congress were, in November, 1908, elected under the apportionment act of 1900. They were, as we may judicially know, admitted to their respective seats, and as we may also take notice, their successors have been elected according to the same scheme of apportionment. The thing sought to be prevented has been done, and can not be undone by any judicial action. Under such circumstances there is nothing but a moot case. (*Mills* v. *Green*, 159 U. S., 651; *Jones* v. *Montague*, 194 U. S., 147.)
>
> The duty of the court is limited to the decision of actual pending controversies, and it should not pronounce judgment upon abstract questions, however such opinion might influence future action in like circumstances.

The foregoing cases, we think, abundantly determine the general principle which controls in this case.

While it is true that there yet remains before the Interstate Commerce Commission a complaint of Eichenberg for damages arising out of the undue preferences and advantages accorded Young, yet that is an entirely separate and distinct proceeding. We quote from the Interstate Commerce Act, section 16:

> That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party

complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, *or in any state court of general jurisdiction having jurisdiction of the parties*, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit *in the circuit court of the United States shall proceed in all respects like other civil suits for damages*, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not

> after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court *or state court* within one year from the date of the order, and not after.

It thus appears that Congress has expressly provided that a claim for damages arising out of an unreasonable rate or an undue preference shall proceed in a separate action. It may even be brought in a state court and the case between the carrier and the Commission has nothing to do with the private action for reparation.

Congress has provided a speedy method of determining the validity of the Commission's order affecting rates or preferences in which the public generally is interested, by authorizing a direct appeal from a circuit court of the United States to the Supreme Court, and by applying the provisions of the so-called Expediting Act (32 Stats., 823) to such cases. But with respect to the private action of a complainant for damages, this "*shall proceed in all respects like other civil suits for damages,*" as required by section 16 of the interstate commerce act quoted above.

The public action to which the Commission and the railroads here are parties may be heard and disposed of many years before the private action reaches the Supreme Court, if it comes here. In the present instance it does not appear that any private suit for damages has been brought or will ever be brought. The record shows (p. 97) that

the Commission found there was no evidence upon which any reparation could be awarded to the complainant, and he was authorized to present his claim to the Commission. Counsel for appellants assert that the complainant has filed such a claim with the Commission, but it does not appear that the Commission has accorded any hearing, awarded any damages, or made any order on the subject. If the Commission does make such an award, the complainant must still bring a suit to recover, as provided in section 16 above, and he need not bring that suit for one year after the award is made. If such a suit is ever brought, the railroad can make every defense which it could make in the case at bar and many defenses which it could not make in the present suit. Inasmuch as appellants contend that the order of the Commission, finding the preference in favor of Young undue and unlawful, asserts an authority over commerce which is not interstate, they are claiming the invasion of rights under the Constitution, and these same rights would, if valid, constitute a defense in the private action for damages, and that case would be finally reviewable by this court.

In addition to this, these appellants, if they are hereafter sued by Eichenberg for damages, may make other defenses which could not be set up in the case at bar. For example, in the damage suit it must appear not only that the contract between the railroads and Young constitutes an undue and unlawful preference, but that it constitutes such a prefer-

ence as to Eichenberg, and that he has suffered a pecuniary loss thereby. Further, it is apparent that no recovery by Eichenberg can be made for the two-year period during which the order of the Commission was in force, because that order has been obeyed and Eichenberg has suffered nothing.

Thus it will always appear in a private action for damages that the order of the Commission finding the rate to be unreasonable or the preference to be undue does not fix or establish the right of the complaining shipper to recover.

This two-year limitation upon the life of an order of the Commission was designed as a protection to the railroads. Congress recognized the mutability of railroad rates and the constant variation in conditions upon which they are based. It provided, therefore, that in no event should an order of the Commission be in force for more than two years.

Section 15 of the interstate commerce act, after providing that all orders of the Commission, except orders for the payment of money, shall continue in force such period of time, not exceeding two years, as the Commission may prescribe, declares that this shall be so, unless the order "*shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction.*" Certainly the mere reading of this section indicates that this special proceeding authorizing the expeditious hearing of cases brought to set aside an order of the Commission was designed to permit the suspension or setting aside of such order *while the order*

was in force, and not after it had expired. The appellants having availed themselves of this special proceeding with its direct appeal to this court, must be limited in their relief to the terms of the act under which they seek it. It is to be observed, further, that in section 16 of the interstate commerce act there is a provision made for the Commission itself to bring an action to enforce its own order in the courts, and this section expressly declares that if any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, "*while the same is in effect,*" any party injured thereby, or the Commission in its own name, may apply to the appropriate circuit court for the enforcement of such order.

There is no justification for supposing that if the Commission brings an action to enforce its order the action must be maintained while the order is in effect, while the railroad may bring an action to set aside an order after it has expired.

Counsel for appellants, in their brief called "Notes of Argument," give several reasons why the court should take jurisdiction of this case despite the fact that the order of the Commission complained of has expired and the controversy between the parties is now moot. Counsel say, at page 30, that if this appeal is dismissed and the terminal company should renew its lease with Young it would be met in any proceeding brought by Young's competitor, Eichenberg, before the Interstate Commerce Commission with the claim that the questions were already *res*

adjudicata by reason of the former proceeding. This is a novel application of the principles of *res adjudicata*. The very purpose of the two-year limit in the interstate commerce act is to require the Commission to grant a new hearing and make a new order, after the expiration of an old one, before a reduction in rates or a removal of preferences can be enforced. If the finding and order of the Commission upon a complaint to-day become binding for all time between the complaining shippers and the carrier, there would be no effect given to the two-year limit upon the life of the order.

Counsel for the appellant further say that "if this case is dismissed upon the ground that it is a moot case, then the question of the right of Eichenberg to damages on the claim filed by him is *res adjudicata*." The answer to this is that Eichenberg is not a party to the case at bar and can claim nothing whatever under a judgment in this case. When Eichenberg comes to try his suit for damages, if he ever brings one, the state or federal court and jury before whom it may be tried will have before them the fact that the Interstate Commerce Commission found the preference here complained of to be undue and unlawful; that the circuit court refused to disturb the order of the Commission, and (assuming that the contention of the Government in this case is sustained) that the Supreme Court did not pass upon the question for the reason that the order in the meantime had expired. But the jury hearing Eichenberg's private case will not be bound by the

finding of the Commission in another proceeding, and the court will not be bound by the action of the circuit court on the subject. Least of all will the railroads be bound.

It is true that the interstate act in section 16 above set out provides that on the trial of a private suit for damages "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." But this rule of evidence only serves to show the more clearly that no order of the Commission, whether made to terminate an undue preference or subsequently to award damages to a complainant, is *res adjudicata* as to any one, and this rule of evidence continues to operate in the private action for damages, whether the order of the Commission directed against the rate or practice be set aside by the court or not.

Counsel for appellants cite an Arkansas case (*Click* v. *Sample*, 73 Ark., 194) where a court refused to dismiss an appeal although the contract, the validity of which was attacked, had expired before the appeal was heard, and this on the ground that an injunction bond had been given in the lower court and liability upon this bond depended upon the final determination of the case. Of course it may well be that where there remains in a case a substantial collateral controversy, over and beyond the costs, and this controversy is determined by the final judgment on the main issue, and determinable in no other way, the court may hold jurisdiction although the main issue has become moot. But in the case at bar there

is no collateral controversy between the parties. The only controversy relied upon is a possible independent suit which may be brought in some other court by another party against the appellants here.

Appellants say that there is a prayer in the complaint asking that if the order of the Commission is not set aside "the contract between the terminal company and Young should be canceled," and they contend that this leaves a controversy still pending between the parties, which is "a live question" and is not affected by the expiration of the order of the Commission. There is no conceivable ground upon which any rights between Young, the preferred shipper, and the railroads which granted the preference can be worked out in a case which involves only the validity of the Commission's order requiring the preference to cease. It is true that the railroads here made Young a party defendant with the Interstate Commerce Commission in the circuit court, and while maintaining the validity of their contract with Young asked the court if it found the contract to be unlawful to cancel it. It is true, also, that Young filed an answer and cross bill in the circuit court, maintaining the validity of his contract with the railroads, but asking the court if it found the contract to be illegal to require the railroads to furnish equal facilities to other shippers. But the interstate commerce act provides a special jurisdiction in the circuit court, with a direct appeal to the Supreme Court to determine the validity of orders of the Commission. The only question triable

in such a case is the lawfulness of the order, and the only persons bound by the judgment are the railroad and the Commission. Young was not a proper party to this case. The circuit court had no jurisdiction over him for any purpose whatever. It had no jurisdiction over any controversy between Young and the railroad, *growing out of the order of the Commission*, for its jurisdiction was confined to either setting aside or refusing to set aside the order. It had no jurisdiction over Young and the railroad, *independent of the order of the Commission*, because there was no controversy between them since both claimed that the contract between them was valid. Young and the railroad had no right to attempt the litigation of a pretended controversy between them in an action which involved only the validity of an order of the Commission requiring that an undue preference should cease. Therefore the circuit court was right in dismissing Young's cross bill without prejudice.

Counsel also suggest that if this court does not review orders of the Interstate Commerce Commission after they have expired, the Commission may, by postponing a final hearing in this court, or by making its orders run for short periods, prevent any effective review. The assumption here involved is not justified by the record of the Commission's work or the character of its membership. More than that, if the Commission should attempt thus to defeat the purpose of the act creating it, the railroads could rely upon the courts to suspend by injunction any order of the Commission that was designed to effect such a result

and so insure the very review in the courts which the Commission had attempted to prevent.

Appellants cite the case of *United States* v. *Trans-Missouri Freight Association* (166 U. S., 290) as an authority for the proposition that because of the public interest involved the court should pass upon the validity of an order of the commission which has expired by lapse of time. Putting aside the fact that in the *Trans-Missouri* case the public interest was concerned in having the case heard which the railroads contended was moot, while in the case at bar the contrary situation exists, it must be noted that the real reason why this court heard the *Trans-Missouri* case, notwithstanding the fact that the particular association was dissolved, was that the unlawful agreement and alleged combination in restraint of trade was the gist of the complaint, and that agreement or combination might have continued between the same parties although the particular association which formed it had gone out of existence. Further, the Government in that case was seeking not alone to dissolve a particular association, nor to prevent the carrying out of a particular agreement, but to enjoin the forming or maintenance of like associations or agreements in the future, and the court very properly refused to permit a mere shift in name or form to effect a change in essence or substance.

We therefore submit that this court should dismiss the appeals herein for the reason that, the

order of the commission having expired, the case is moot.

Coming now to the consideration of the merits, we proceed to discuss the contentions heretofore mentioned, in their order.

I.

The Southern Pacific Terminal Company is subject to the act to regulate commerce.

The agreed statement and the findings of the Commission in its opinion show the following facts; and a full statement of these is necessary in order to determine this preliminary question:

The Southern Pacific Terminal Company is a corporation organized and existing under the laws of the State of Texas. Its articles of incorporation show that it was organized for the purpose of constructing, owning, and operating docks and wharves on the coast of the State of Texas, and all necessary facilities in connection with operating docks, wharves, warehouses, and grain elevators and of enjoying the property, rights, privileges, and franchises granted by by the State of Texas through a certain act of the legislature approved May 1, 1899, which act is made a part of the articles of incorporation. By its articles of incorporation it is authorized to construct and maintain upon the property described in the act "terminal facilities for the use of what are commonly called 'the Southern Pacific Railroad and Steamship systems,' their successors and assigns," and also to

buy, lease, hold, and enjoy real and personal property necessary in the transaction of its business.

The Southern Pacific Railroad and Steamship systems referred to above include a line of steamships owned by the Southern Pacific Company plying from New York to Galveston and New Orleans and also plying between New Orleans and Habana, the Galveston, Harrisburg & San Antonio Railway Company, Morgan's Louisiana & Texas Railway & Steamship Company, Louisiana & Western Railroad, the Texas & New Orleans Railroad, and certain other railroads extending from El Paso to San Francisco.

The Southern Pacific Terminal Company owns and maintains tracks on its property used in moving cars to and from ship side. The Galveston, Harrisburg & San Antonio Railway Company, a corporation under the laws of the State of Texas, owning and operating a line of railroad from Galveston to El Paso, has direct physical connection with the tracks of the terminal company, and it is the only railroad having such connection.

The Southern Pacific Company is a corporation organized under the laws of the State of Kentucky and authorized by its charter to hold bonds, stocks, etc., of other corporations, and to enter into contracts with respect to the construction, acquisition, leasing, maintenance, and operation of railroads, telegraphs, or steamship lines, in any State or Territory of the United States or in any foreign country. The Southern Pacific Company owns 99 per cent of the stock of the Southern Pacific Terminal Company, and 99 per cent

of the Galveston, Harrisburg & San Antonio Railway Company, as well as 99 per cent or more of the stock of all the companies mentioned as constituting the Southern Pacific railroad and steamship systems. The Southern Pacific Company and the Terminal Company have the same president. The Galveston, Harrisburg & San Antonio Railway Company and the Terminal Company have the same general manager.

All the traffic carried over the railroads above mentioned as constituting the Southern Pacific Railroad and Steamship systems into Galveston for movement from Galveston by steamships of the Southern Pacific Company passes over the wharves of the terminal company; likewise all traffic moving into Galveston by said steamship lines for movement out over said railroads passes over the wharves of the terminal company. The only track facilities for movement of cars to or from ships berthed at the Southern Pacific Terminal Company's docks from or to the tracks of the Southern Pacific railways are those owned by the terminal company on its own lands. The Galveston, Harrisburg & San Antonio Railway switches cars for other railways onto the tracks of the terminal company, and for this service receives from the railroad for whom the service is performed $1.75 per car, while the terminal company receives from the Galveston, Harrisburg & San Antonio Railway, and the other railways whose cars are switched, a trackage charge of 50 cents per car.

The terminal company carries on a wharfage business, and publishes a schedule of its charges, which,

however, is not filed with the Interstate Commerce Commission. This schedule provides for 20 cents per ton on cotton-seed cake and meal, and this is shown as a wharfage charge in the tariffs of the Galveston, Harrisburg & San Antonio Railway Company, and other railways entering the city of Galveston.

The terminal company was a party to numerous circulars issued by the Southern Pacific Railway companies known as the "Sunset route." One of these circulars, to wit, that effective May 23, 1905, was filed with the Interstate Commerce Commission. These circulars give terminal charges at the port of Galveston. The charge on cotton-seed cake and meal is 1 cent per 100 pounds.

The lands secured by the terminal company, and upon which it conducts its business, were formerly owned by private parties; these lands were conveyed to Collis P. Huntington, and while so held by him the city of Galveston passed an ordinance abandoning, discontinuing, and closing certain streets, avenues, and alleys, and authorizing said Huntington perpetually to construct and maintain piers on the shore of Galveston Bay, within the corporate limits of the city of Galveston, upon certain specified conditions. May 1, 1899, the State of Texas conditionally relinquished any claim or title it had to any part of the property described in the act, on the condition that said Huntington commence the construction of terminal facilities for the Southern Pacific Railroad and Steamship systems, dredge a channel,

and construct piers and depots within the time mentioned in the act.

It was further provided in said act that wharfage charges made for the use of the piers or other facilities of the property of Huntington should be subject to the regulation of the railroad commission of Texas. The ordinance of the city of Galveston hereinbefore referred to was in all things ratified and confirmed, and the State relinquished its title to the flats, or lands under water, subject to the conditions that the terminal facilities should be erected thereupon and that the railroad tracks should connect with the tracks of any railroad company that might be built to the intersection of Forty-first street and the prolongation of Avenue A. The consideration was duly performed and fulfilled by said Huntington, his heirs and assigns, within the time limited. The Terminal Company has three piers, "A," "B," and "C," on its lands.

Now, on the foregoing facts, what legal status exists? By section 1 of the interstate commerce act, as amended June 29, 1906, it is provided:

> That the provisions of this act shall apply to * * * any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State * * *.

> The term "railroad," as used in this act, shall include * * * all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported (34 Stat. 584).

The Southern Pacific Terminal Company was, by its articles of incorporation, organized for the purpose of acquiring docks, wharves, etc., and certain specified property, and to construct and maintain upon said property "terminal facilities for the use of what are commonly called Southern Pacific Railroad and Steamship system." It was, at the time of the contract with Young, engaged in performing this service. It has track connection by means of its own tracks with those of one of the railroads of the Southern Pacific system entering Galveston, to wit, the Galveston, Harrisburg & San Antonio Railway, and it constitutes

the only terminal facilities that the roads of this system have in Galveston for the delivery and transfer of freight moving over its lines. It publishes a schedule of its charges and makes a uniform charge for all shippers with the exception of the discrimination in favor of Young now complained of. These charges are shown as the terminal charges at the port of Galveston for certain of the railroads of the Southern Pacific system, and circulars are issued jointly by these railroads and the terminal company.

Not only does it appear in the charter of the terminal company that the purpose of its being is to furnish terminal facilities for the Southern Pacific system, but it is itself actually an integral part of that system. It is itself owned, managed, and controlled practically to the same extent and in the same manner as all the other railroads in the system by the Southern Pacific Company. Ninety-nine per cent of its stock is held by the Southern Pacific Company, just as 99 per cent of the stock of most of the other corporations forming part of the system is so held. Both the terminal company and the railroad for which it furnishes facilities have the same general manager.

Any fair construction of the interstate commerce act would seem to lead inevitably to the conclusion that the Southern Pacific Terminal Company is within the terms of that act, which, by its express language, applies to "terminal facilities of every kind used or necessary, * * * all freight depots, yards, and grounds used or necessary in the trans-

portation or delivery * * * of said property, * * * and all instrumentalities and facilities of shipment, * * * irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation," etc.

The thought occurs at once that if terminal facilities such as those maintained by the Southern Pacific Terminal Company are not included within the terms of the act, then evasion of the provisions of the act, so far as they relate to any terminal facilities, is possible by every common carrier, by the simple expedient of providing a separate corporation nominally to control such facilities. The argument is well presented in the unanimous opinion of the Interstate Commerce Commission delivered by Chairman Knapp in the case in which the order complained of here was made. (*Eichenberg* v. *Southern Pacific Co. et al.*, 14 I. C. C. Rep., 250, 263.) We quote a part of the opinion here:

> It is contended in behalf of the defendants that the Southern Pacific Company and the terminal company are not common carriers, and therefore not subject to the jurisdiction of the Commission. The former, defendants urge, is a holding company, and the latter a wharfage company, and neither is engaged in the business of transportation. Considered alone, neither comes within the definition of a common carrier. There is no doubt, however, that the railroad and steamship lines forming the so-called Southern Pacific system

are one in control and operation. They are all owned by the Southern Pacific Company. The holding company and the companies owned by it have, generally speaking, the same officers, and in cases where this is not so the managing officers are such as to assure that the interest of the whole will be subserved by the acts of each constituent part. The Terminal Company was organized to furnish terminal facilities for the system at the port of Galveston, and the land upon which its docks and wharves are erected and maintained was granted to its predecessor, as expressed in the act of the Texas legislature, for the purpose of supplying such facilities. As above stated, the Southern Pacific Company owns and controls lines of railroad reaching from New Orleans to San Francisco and Galveston, and a steamship line from the latter place to New York and Habana. Through shipments on these lines from and to points in different States of the Union pass and repass over the docks of the Terminal Company. It forms a link in this chain of interstate transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation.

It is also urged that inasmuch as the Terminal Company is not owned by the railroad company with which the tracks on its dock connect, it can not be held to be a part of that or any other railroad carrier. We are constrained to reject this contention. It does not appear to make any difference whether or not the

connecting railroad company owns the terminal company if the ownership of both is vested in the same corporation. Control is an incident of ownership, and, as a matter of fact, the Southern Pacific Company, the Terminal Company, and the Galveston, Harrisburg & San Antonio Railway Company have the same president. The last two have the same general manager, who occupies that position with all the Texas roads of the system. The interests of the railroad and steamship lines of the system transporting shipments to and from Galveston are identical. The money earned and dividends paid inure to the one owner.

That the management of the Terminal Company considered its relation identical with the railroads embraced in the system is abundantly established by examination of the eighth article of the contract made with Young. Therein Young agreed to route all his shipments over "the lines of said Terminal Company and its connections, according to the instructions of said Terminal Company from time to time." It is further provided that unless the rates of these lines are equal to or lower than those made by competing lines Young shall not be bound to so route his shipments, but he is required to give "notice to the Terminal Company of rates proposed by such competing line or lines and shall further give said Terminal Company the option of meeting such proposed rates; and in event that said Terminal Company elects to do so, then Young shall not divert such shipments, but shall abide by the provisions of this article."

A corporation such as this Terminal Company, which has "connecting lines" and which has power to meet rates made by "competing lines," should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company.

It is true that the different corporations under consideration are operating under separate and distinct charters, but, nevertheless, they constitute a single system. To complete that system the Terminal Company is a necessary part. Shipments over the Southern Pacific system, not for export, but from and to different States in the Union, all pass over the docks of the Terminal Company. It is conceded that the railroad companies carrying interstate shipments to and from Galveston, though owned by the Southern Pacific Company, are subject to our jurisdiction, but the contention is made that the point where the railroad lines end and the tracks of the Terminal Company begin is the point beyond which the power of the Commission does not extend. We can not yield assent to this proposition. The Terminal Company is part and parcel of the system engaged as a whole in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all their terminal facilities from our regulating authority.

> The act in its first section includes in the term "railroad" "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and *terminal facilities* of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property." The rails of the Galveston, Harrisburg & San Antonio Company connect with tracks upon the docks of the Terminal Company. The former delivers cars loaded with interstate freight to the latter. The only terminal the roads of the Southern Pacific system have in Galveston for the delivery and transfer of freight moving over its lines is that furnished by the Terminal Company. It is true that the latter collects a trackage charge from the former and that the railroad company collects a switching charge from the Terminal Company. These charges are, however, but incidents of the separate corporate operations.

The language of the interstate commerce act is broad enough to cover the case of the Southern Pacific Terminal Company, and when the purpose and intent of the act are considered its application to such a situation is clear. It is settled that the act must be liberally construed to advance the purposes for which it was enacted. As said in the syllabus to

New York, New Haven & Hartford R. R. Co. v. *I. C. C.* (200 U. S., 361):

> The interstate commerce act was enacted to secure equality of rates and to destroy favoritism, and for those purposes is a remedial statute, to be interpreted so as to reasonably accomplish them.

That the Southern Pacific Terminal Company's business was affected with a public interest there can be no question from the facts. In *Barrington* v. *Commercial Dock Co.* (15 Wash., 170, 175) it is said:

> "When wharves belonging to individuals are legally thrown open to the public, they become affected with a public interest." We think that in determining the character of appellant's wharf, regard should be had to the use to which it has been devoted rather than its private ownership, and that upon the facts found the position of the appellant can not be maintained. As well might the proprietor of a stage coach claim the right to discriminate upon the ground that the property employed in his business was private property.

See also *Indian River Steamboat Co.* v. *East Coast Transportation Co.* (28 Fla., 387).

Appellants confuse the character of the title to the property acquired by the terminal company with the business carried on by that company. Much is made of the claim that the terminal company acquired its real estate in fee. If this were true, it would not affect the question. Any public-service corporation may acquire property in fee, but that fact does not

justify discriminations among its customers, even though such discriminations are by means of a contract relating to its real estate.

Leaving out of consideration the purpose for which the company was organized, the fact remains that the terminal company was and is holding itself out to the public as furnishing general terminal facilities in connection with certain railroads, and as such is subject to governmental supervision. As said by this court in the case of *Missouri Pacific Railway* v. *Flour Mills Co.* (211 U. S., 612, 619):

> While no one can be compelled to engage in the business of a common carrier, yet when he does so certain duties are imposed which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others.
>
> No legislative enactment, no special mandate from any commission or other administrative board, was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.

In the case of *United States* v. *Delaware & Hudson Co.* (213 U. S., 366, 418) this court said:

> The claim now to be disposed of is that by the true construction of its charters the Delaware & Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation *was engaged* as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause and subject to the regulations which are embodied therein as we have interpreted them.

Whatever the Terminal Company started out to be and with whatever purpose it originally purchased the land it occupied it has now become a corporation serving the public generally in the matter of railroad terminal facilities. It has a uniform rate for such service without any discrimination except in favor of E. H. Young.

The case of *L. & N. R. R. Co.* v. *West Coast Naval Stores Co.* (198 U. S., 483), relied on by appellants, involved a very different question from that in the case at bar. In the *West Coast Naval Stores* case there was no discrimination between shippers, but the only question was whether the railroad com-

pany could make an exclusive contract with a steamship company for carrying goods beyond the line of the railroad company, and refuse to make such contract with another such steamship company. The court held that such contract could be made and that no shipper, using the facilities for connection between the railroad and the favored steamship line, could compel shipment over some other steamship line.

At page 494 the court say:

> If plaintiff chose to employ, for the further transportation of its goods, the vessels with the managers of which the defendant had some business arrangement or contract, it is not denied that the defendant would and did permit such transportation. *In this respect there is no allegation that the plaintiff did not have equal facilities with all other shippers.* Defendant's plea avers that it did give to plaintiff the same facilities for shipping its goods over defendant's wharf that it gave to any or all shippers. In brief, the fact seems to be that the only complaint of the plaintiff is that defendant will not permit competing vessels to make use of its wharf for the purpose of such competition.

Nor does the fact that the terminal company confines its operations to one State affect the question. It is an agency in interstate commerce. In *The Daniel Ball* case (10 Wall., 557) it was urged that if independent agencies, acting entirely within one State and contracting with other independent agencies

for the movement of commodities from one State to another, were to be regarded as engaged in interstate commerce, there could be no such thing as the domestic trade of a State. We quote from the opinion in that case, at page 566:

> And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

In *People* v. *Miller* (178 N. Y., 196), a corporation operating a grain elevator and warehouse, with lines of railroad connecting, but owning no engines, and receiving freight from points both within and without the State, was held to be engaged in an interstate business.

That the terminal company is not only furnishing terminal facilities for the Southern Pacific railroad and steamship system, but is itself an integral part of that system, is clearly shown. It is practically owned and is absolutely controlled by the Southern

Pacific Company, which also owns and controls the other transportation facilities included within the system. It is apparent that the various railroads and steamship lines and the terminal company making up the constituent parts of the Southern Pacific system are practically one consolidated corporation, of which the Terminal Company is the terminal for the delivery and transfer of freight in Galveston. As said by the court in *Northern Securities Co.* v. *U. S.* (193 U. S., 197), speaking of the stock ownership of the Northern Pacific and the Great Northern companies by the securities company (p. 326):

> Necessarily, also, the constitutent companies ceased, under such a combination to be in active competition * * * and have become, practically, one powerful consolidated corporation, by the name of the holding corporation.

And at page 328 the court said:

> The Circuit Court was undoubtedly right when it said—all the judges of that court concurring—that the combination referred to led inevitably to the following results: * * * It placed the control of the two roads in the hands of a single person, to wit, the securities company, by virtue of its ownership of a large majority of the stock of both companies.

It is clear from the facts that the Southern Pacific Terminal Company is practically in no different situation from the terminal facilities provided by any railroad corporation and comes just as clearly within the meaning of the interstate commerce act. To hold

otherwise would be to permit an evasion of the law by any carrier so far as it applies to terminal facilities.

Even if the Southern Pacific Terminal Company be held not subject to the act to regulate commerce, it must not be forgotten that the tariff charge of 20 cents wharfage was provided for in the tariffs of the Galveston, Harrisburg & San Antonio Railway Company. The order was directed against this railway company as well as against the terminal company. The movement of cars over the rails of the terminal company was by the Galveston, Harrisburg & San Antonio Railway Company. It is therefore seen that the railway company, one of the appellants herein, did grant, whether under color of the contract or not, an allowance in violation of its published tariffs, to E. H. Young. The order of the Commission remedied this violation of the statute, and while we think the facts abundantly bring the terminal company as a corporation within the jurisdiction of the Interstate Commerce Commission, yet should this court not so hold, the property of the terminal company was used by the railway company as part and parcel of its property, and so comes within section 1 of the interstate commerce act.

II.

The order of the Commission is a regulation of Interstate Commerce.

As to the character of the commerce affected by the order of the Commission in this case, we select the following facts from the agreed statement and from the findings of the Commission: (Rec., pp. 132–134)

E. H. Young, with whom the contract was made by the Southern Pacific Terminal Company, is an exporter of cotton-seed cake and meal at the port of Galveston, Tex. Under his contract hereinafter referred to with the Southern Pacific Terminal Company he took possession of one of its three piers, namely, pier C, with its improvements erected by the terminal company. Prior to the time he commenced his business at Galveston the custom of the trade had been to grind cotton-seed cake at the producing mills in the interior and there sack and ship it to the port of departure. Young, however, purchased his cotton seed and meal in bulk and had it shipped to pier C at Galveston, where he had it ground into meal, sacked it, and shipped it abroad. The cake and meal was purchased by Young in Texas, Louisiana, Oklahoma, and Arkansas, but chiefly in Texas. It was purchased and paid for by Young on his own account and shipped on waybills showing points of origin in the States mentioned and destination at Galveston. *All the cake purchased by Young is for foreign export and all was in fact exported.* None of the cake or meal purchased by him was consumed locally at Galveston. Sales to foreign customers were made for immediate or future delivery, irrespective of whether there was enough of the product on hand in Galveston or not at the time the sale was made. When there was not enough on hand to fill the orders, the remaining portion of the order was filled from cake purchased in the interior or then in

transit. On shipments made to foreign customers from Galveston Young had issued ship's bills of lading made to his order. Formerly through bills of lading were issued, but on account of the demands of banks, both at Galveston and abroad, the change was made so as to use ship's bills of lading altogether.

When meal was purchased in the States named above it was loaded into a car, which car was delivered by the Galveston, Harrisburg & San Antonio Railway Company upon the tracks located on pier C. From this car the ship's tackle swung the meal direct into the hold of the vessel. There was a continuous movement, and the stoppage at Galveston on wharf C was only long enough to await the coming of the ship or the accumulation of sufficient cargo. Upon these facts as to the nature of the traffic, whether state or interstate, must be determined the validity of the order so far as the question of whether the order, so far as traffic is concerned, is valid.

Section 1 of the act to regulate commerce provides as to transportation subject to the act, in addition to traffic moving from one State into another, the following: "And also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment * * * *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and

not shipped to or from a foreign country from or to any State or Territory as aforesaid * * *."

As to all cotton-seed cake and meal transported from Oklahoma, Arkansas, or Louisiana, or from points in Texas passing through either of these States en route to Galveston, there can be no question that the traffic is interstate. Nor can there be any question that all the traffic handled by Young was carried from a point in the United States to a port of transshipment en route to a foreign country. Plainly, no other jurisdiction than that of the Congress could attach to these shipments. The wharf was used by every shipment, and the tariffs of the Galveston, Harrisburg & San Antonio Railway Company provided a charge of 20 cents per ton on all such shipments. It is contended by appellants that the order of the Commission applied to shipments from points in Texas and that, therefore, the Commission had exceeded its power. An analysis of the order of the Commission shows nowhere, by its terms, that the Commission desired expressly to bring within its terms any traffic except on traffic passing "through the port of Galveston, Tex." Further, the use of the wharf betokens, and the agreed statement shows, a movement of all such traffic to foreign countries.

Appellants contend that in determining the character of the business regulated, the court can consider only that part of Young's shipments, preceding the transshipment at Galveston to foreign countries, and that as to such preceding shipments, since some of them are from points within the State of Texas, the

Commission has no jurisdiction to make the order. Our answer is, that even as to such shipments, and considering them wholly intrastate, no advantage can be lawfully given Young that discriminates in his favor and against interstate shippers in the same business. Young's facilities and all parts of his enterprise were used indiscriminately without any attempt at distinction or segregation in the purchase, sale, manufacture, and shipment of cotton-seed cake and meal, whether state or interstate in its origin. But one regulating body could govern such a course of business. The terminal company and the railway company both used all their facilities and instrumentalities in the transportation and delivery of all this traffic, without any attempt at discrimination or segregation as to whether the traffic handled was state or interstate.

All the charges paid by Young were covered by the sum of $15,000. This covered both state and interstate points of origin. The railway company clearly could not give him an advantage by way of a departure from the published tariffs and say that the sum was intended to cover only traffic originating in the State. This situation is amply covered, and necessarily covered, by that class of regulations which this court has frequently described as those where *uniformity* is necessary. A review of the authorities amply confirms our contention that only one regulating power is possible, and that under our system of government that regulating authority must be the national one.

In the case of *Railroad Company* v. *Fuller* (17 Wall., 560, 568), Mr. Justice Swayne said:

> Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. The authority to regulate commerce, lodged by the Constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must, from the nature of things, be uniform throughout the country. To that extent the authority itself must necessarily be exclusive, as much so as if it had been declared so to be by the Constitution in express terms.

In the case of *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196, 204), Mr. Justice Field said:

> The power [to regulate commerce] also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them, yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive.

In the case of *Missouri Pacific Ry.* v. *Larabee Mills* (211 U. S., 612) this court had before it a contention upon the part of the railroad that there was no power in the State of Kansas to regulate or compel the transfer of cars between the lines of the Santa Fe and certain mills and elevators in the town of Stafford, Kans., because it appeared from the findings that about three-fifths of the flour shipped from such mills and elevators went to points without the State, while the other two-fifths was destined to points within the State, and that, therefore, the entire subject was one within the jurisdiction of the Interstate Commerce Commission, and the State could not exercise power over it. But this court decided that inasmuch as the Interstate Commerce Commission had not acted upon the subject-matter, it came within the class where in the absence of the express action by Congress or its instrumentality, the State might act until such national body had acted.

So in the case of *St. Louis Southwestern Ry. Co.* v. *Arkansas* (217 U. S., 136) we have a pertinent illustration of the rule. In that case it appeared that the railroad commission of Arkansas had promulgated a rule by which it was provided that within five days after written application by a shipper it was the duty of a railway company to deliver freight cars to such shipper for the purpose of loading his freight. The order affected cars engaged both in domestic traffic and in interstate traffic. In a suit against the railroad company for penalties it was alleged, as a defense by the railroad company in its answer, that

it would have been impossible to comply with the rule of the Arkansas commission without discriminating against interstate shippers, and, therefore, that obedience to the rule would have resulted in a direct burden upon interstate commerce. In the opinion of this court these circumstances put the whole matter within the regulating control of the Interstate Commerce Commission.

To the same point is the rule stated by Judge Baker, of the sixth circuit, in case of *Interstate Commerce Commission* v. *Illinois Central Railroad*, which came to this court and was decided in 215 U. S., 452. Judge Baker said:

> It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers can not be required to take into consideration the cars of shippers who do only an intrastate business.
>
> Where federal authority exists it is paramount. It exists here by virtue of the fact that the complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions, and regulations of the carriers must give way.

Most pertinent, too, is the decision of the Circuit Court of Appeals of the Eighth Circuit in the case of *United States* v. *Colorado Northwestern Railroad Co.* (157 Fed., 321, 330), wherein it was held:

> The Constitution reserved to the nation the unlimited power to regulate interstate and foreign commerce, and if that power can not be effectually exercised without affecting intrastate commerce, then Congress may undoubtedly in that sense regulate intrastate commerce so far as necessary, in order to regulate interstate commerce fully and effectually.

The business in which Young was engaged was interstate in its character. This character of business embraced the whole course of his trade. He shipped goods from various parts of the United States to Texas. As above stated that part of the products which came from Texas were inextricably associated with and related to products shipped from Arkansas, Oklahoma, and Louisiana. The only power that could adequately prevent undue discrimination between Young and other shippers in similar business was the national authority exercised through the Interstate Commerce Commission and governing the whole field of commerce.

The purpose of the act to regulate commerce was to secure uniformity and equality, and the Commission in carrying out the provisions of that act has the power, if necessary, to secure equality among those engaged in interstate commerce, indirectly to affect intrastate shipments, thereby securing such

uniformity and preventing undue discriminations against interstate commerce.

But it clearly appears that all of Young's shipments, whether originating in Texas or in other States, were in fact made to foreign countries. All of them were, to quote section 1 of the act,—

> Property shipped from any place in the United States to a foreign country and *carried from such place to a port of transshipment.*

The State Supreme Court of Texas has held in the case of *Houston Direct Navigation Co.* v. *Insurance Company of North America* (32 Southwestern, 889) that cotton being transported to Galveston from a point within the State, but destined for transportation beyond Galveston, is interstate commerce.

But even if a portion of Young's shipments are to be considered as not within the provisions of the Interstate Commerce act, that fact does not make void the order of the Commission. The act of the Commission is presumed to be limited to the power the Commission had.

Oregon R. R. and Navigation Co. v. *Campbell* (177 Fed. 318). In this case an order of the state railroad commission regulating freight rates was interpreted to apply only to intrastate commerce so as to make the order valid, under the rule that an order should be so construed as to render it not subject to an objection that would be fatal to its validity, if possible.

That it did not point out in detail the manner in which discriminations should be removed does not

make the order void. (*New York Central & Hudson River R. R. Co.* v. *Interstate Commerce Commission,* 168 Fed., 131.) The Commission left it to the carriers, the appellants herein, to remove the injustice which the Commission found to exist by either extending the facilities and practices afforded to Young to all others on like terms as Young, or else to withdraw from Young the undue advantages which he had been afforded. We therefore submit that the order, so far as the questions of power under the commerce clause are concerned, was valid in every respect.

III.

The contract with Young constitutes an undue preference.

The facts necessary to a determination of the question embraced in this subdivision of the brief, as shown by the agreed statement and findings of the Commission, are the following:

All wharf facilities at the port of Galveston are furnished by two corporations, the Southern Pacific Terminal Company and the Galveston Wharf Company. The latter company has a water frontage laid out in piers, of which thirty-eight have been constructed. This company owns locomotives and railroad tracks on its wharves, which connect with railroads entering Galveston, and it handles all freight destined to pass through or over its wharves over or to any line of railroad for which it exacts a

switching charge and also a wharfage charge of 1 cent per hundred pounds on cotton-seed cake and meal.

Prior to the agreement with Young, the Southern Pacific Terminal Company had on its property two piers, known as A and B. At this time there was some abandoned railroad track on piling used by a former jetty contractor and which, at the instance of Young, was later conformed into pier C. On these three piers—A, B, and C—the terminal company has all facilities necessary for handling export and import freight, and the company also has additional ground upon which more piers may be erected. Upon all these piers have been built railway tracks to facilitate movement from ship to railroad and from railroad to ship. The terminal company operates no engines. All freight passing over the piers A and B pays the terminal company a fixed wharfage charge, and for cotton-seed meal and cake this charge is 20 cents per short ton. If any exporter other than Young handles over wharf C, the wharfage is paid direct to Young. In the case of the ordinary shipper at Galveston, freight intended for local consumption is granted forty-eight hours free time within which to unload, and if intended for export is allowed ten days. All Young's freight was allowed ten days.

All railroads entering Galveston allow 12½ cents per ton for unloading of export freight from cars to the wharves, this amount being paid by the railroad to the persons who do the unloading. Freight in the ordinary sense is loaded from railroads at ship

side into holds of ship by stevedores under employment of a contractor who receives a loading charge which is included in the ship's freight charges and is paid either by consignee or consignor.

The contract entered into between the Southern Pacific Terminal Company and E. H. Young was made after certain preliminary negotiations between Young and the traffic manager of the Galveston, Harrisburg & San Antonio Railway Company during the year 1905. A supplemental agreement was made in 1906, and both sets of agreements were merged into an agreement dated November 1, 1906. (Rec., 82.) This last-mentioned contract provided in substance for the lease by the terminal company to E. H. Young for a term of five years of a certain dock and warehouse, its sheds, platform and tracks, with the privilege on the part of Young of placing in said warehouse machinery and appliances for storing and handling cotton seed and products thereof, and to have possession and control of said dock and warehouse. The terminal company agreed to furnish electric power for the use of Young at reasonable rates, to keep the dock and warehouse in reasonable repair, and to maintain a proper depth of water to accommodate ocean steamers loading and unloading cotton-seed products at said dock. In consideration of the undertakings on the part of the terminal company Young agreed to pay $15,000 per annum, and further agreed to route all shipments of cotton seed and cotton-seed products purchased or shipped by or to him over the lines of the terminal company and its

connections, according to the instructions of the terminal company, and to insist upon such routing for all cotton seed purchased and shipped by or to him in all cases except where enforcement of such routing would prevent him from purchasing cotton-seed products for which cars could not be procured for the routing required. In case rates of the connections of the terminal company were not as reasonable as those of some other route, the terminal company should have the option of meeting such rates.

Under the provisions of this contract the terminal company proceeded to construct for the use of Young a warehouse, shed, and platform upon pier C at an expense of about $65,000. Upon this pier Young placed machines for grinding and sacking cake at a cost of about $50,000. For all the facilities afforded him Young pays no more than the annual sum of $15,000. He is free from the payment of any charges, whether wharfage, storage, or for other services, of the terminal company such as are provided for in the tariffs of the railway company and are exacted from other shippers of cotton-seed cake and meal at the port of Galveston. By reason of these facilities he is enabled to unload his freight within the free time allowed at Galveston and incurs no demurrage. He unloads his own export freight from the cars and saves 12½ cents per short ton paid by the carrier. He is enabled to do his own stevedoring, receiving from the ships as a contractor 30 cents per ton. During the period from September 1, 1906, to September 1, 1907, Young exported from the port of

Galveston about 105,000 tons of cotton-seed cake and about the same amount of cotton-seed meal, a total of 210,000 tons. If Young had paid wharfage charges at the regular tariff rate on these shipments he would have paid about $42,000. Instead, under his contract he paid only $15,000. This $15,000 apportioned over the tonnage shipped amounts to about 7 cents per ton. Here is the largest and most material fact in this case. Instead of paying the regular established published charge of 20 cents per ton, he paid only 7 cents per ton—less than 40 per cent of the charge paid by his competitors, who were not afforded even the privileges of grinding upon the wharf. Under this arrangement between Young and the appellants herein Young's business increased at Galveston until his exports exceeded in volume that of all other exporters. During the year that Young exported the 210,000 tons of cake and meal all other exporters in Galveston did not ship to exceed 50,000 tons.

It is claimed by some of the producers in Texas that Young is able to dominate the market and command the foreign trade.

During the past few years while Galveston in its exports has increased by leaps and bounds, Port Arthur and Sabine Pass have decreased in their exports, and the great port of New Orleans has stood still.

Upon substantially these facts the Commission found that the appellants herein were according to

E. H. Young an undue preference, and were inflicting upon his competitors an unjust discrimination.

Passing by for a moment the fact that the complaint was brought by a competitor who testified that he had been driven out of business by his inability to cope with Young under the conditions which the appellants herein had created for Young, we come to consider whether these facts constitute an unjust discrimination. Nowhere in its order does the Commission declare the contract invalid as a whole. The Commission's order was directed solely to two points, the prevention of further wharfage charges to Young at other than the published tariff rate and the securing of wharf privileges either for all alike or withdrawing the privileges which Young unfairly had secured.

We quote from the act to regulate commerce, sections 2, 3, 6, and 15, so far as material to the determination of the inquiry here:

> SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circum-

stances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever. * * * (24 Stat., 379, 380).

SEC. 6. That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or con-

signee * * *. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act * * *.

No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariffs filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facility in the transportation of passengers or property, except such as are specified in such tariffs. * * * (34 Stat., 586, 587).

SEC. 15 (as amended June 29, 1906). That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of

> persons or property as defined in the first section of this act, *or that any regulations or practices whatsoever* of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what would be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed (34 Stat., 589).

Wherever this court has had occasion to construe those portions of the act to regulate commerce which were intended to secure equality among the patrons of the common carriers of the country it has emphasized the necessity for liberal construction so as to advance the remedy and retard the wrong. Such was the holding in the case of *New York, New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission* (200 U. S., 361), wherein in substance this court held that the interstate commerce act was enacted to secure equality of rates and to destroy

favoritism, that for these purposes it is a remedial statute to be interpreted so as to reasonably accomplish them; its prohibitions against directly or indirectly charging less than the published rates are all-embracing and applicable to every method by which the forbidden results could be brought about. We quote directly from the opinion at page 392:

> The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about.

So in the case of *American Express Company* v. *United States* (212 U. S., 522, 532), wherein it was declared that the intention of Congress, as expressed in the act to regulate commerce, was to prevent departure from the published rates and schedules in any manner whatsoever.

Prior to Young's contract with the terminal company every shipper of cotton-seed cake and meal whose products entered Galveston and passed over the wharf of the terminal company was required to pay certain wharfage charges according to a fixed schedule shown as terminal charges on the tariffs of the railroads, and also had to pay certain fixed charges for storage and other facilities accorded. Young, intending to enter upon the business of exporting cotton-seed cake and meal on a large scale, secured for himself through the contract services

and facilities which under the lawful published rate would have cost him $42,000 for wharfage alone for the sum of $15,000. No other shipper had or could secure such an advantage. That this agreement constituted a discrimination in favor of Young seems too clear for argument.

Contracts between railroad companies and shippers by which, for some stated consideration, a less charge is made either for facilities furnished or freight carried than is made to other shippers have frequently been passed upon and held to violate statutes against undue preferences. Such a case was *Hurley* v. *Big Sandy & C. R. R. Co.* (125 S. W., 302). In this case the court held invalid, as contrary to the Kentucky statute, a contract by which freight was carried free in consideration of the grant of a right of way.

In *C. & O. Ry. Co.* v. *Standard Lumber Co.* (174 Fed., 107) the Circuit Court of Appeals of the Fourth Circuit had under consideration a contract between a lumber company and a railroad company by which the lumber company, a shipper of railroad ties, agreed with the railroad company to build a tie hoist for loading ties at a station and the railroad company agreed to haul the lumber company's ties to a designated point for a fixed sum and to return 10 per cent of the freights so received to apply on the cost of the hoist until entirely paid for, when it was to become the property of the railroad company, in the meantime, however, to be used only by the lumber company. The court held that

such contract was one designed to give the lumber company an undue preference or advantage over other shippers in violation of the interstate commerce act. The court says, at page 112:

> That the construction of the tie hoist in question inured to the benefit of the Standard Lumber Company, in that it gave such company a preference over other companies similarly situated, is apparent from an inspection of the agreement. In other words, it can not be denied that the payment back to a shipper, as in this instance, of 10 per cent on the freight bills paid by the shipper to the railway company, must necessarily result in the shipper getting its property transported at a lower rate than that indicated in the published schedules.

Again, at page 113:

> It could not be reasonably contended that, if the railway company had, in the first instance, erected this hoist on its own account, it could have fixed a cheaper rate for a particular company engaged in delivering its ties over the same, and also denied the right to others to deliver their ties for transportation by the same method and at the same rate. Such conduct on the part of the railway company would undoubtedly have been in violation of the statute, and, when we come to analyze this contract, that is precisely what was proposed to be done by the terms thereof.

In *Hobart-Lee Tie Co.* v. *Stone* (117 S. W., 604; 135 Mo. Ap., 438) the facts show that a railroad company had depot grounds near a river where rafts

of ties were landed from the river to be loaded upon the trains of the railroad company, for shipment, and owned a tract of land adjacent to its depot grounds, extending to the river where it was convenient to land such tie rafts. The railroad company gave to the Hobart Tie Company, a corporation engaged in the business of floating ties down the river and shipping them from that point, a lease upon the land between the depot grounds and the river, where it was most convenient to land and pile the ties awaiting shipment. The court held such lease to be void as a discrimination against a person engaged in the same business of shipping ties and contrary to the statutes of Missouri against discriminations in the facilities for transportation of freight, etc. Of this contract of lease as constituting an undue preference in favor of one shipper the court says (p. 458):

> We can come to no conclusion, from a careful reading and consideration of all the testimony in the case, other than that the lease or license from the railroad company to the appellant conferred upon appellant an undue advantage as a shipper over the defendant, who was also a shipper of the same kind of freight at this same point, and effected a "discrimination * * * in facilities in the transportation of freight * * * between commission merchants or other persons engaged in the transportation of freight, in favor of (appellant) by abatement, drawback, or otherwise," contrary to section 1127, Revised Statutes, 1899.

Again, at page 460:

> It seems to us that this statutory provision covers this case, as we are satisfied that the effect of the lease or license was to confer a decided and very great advantage on one shipper, the appellant here, over its competitor, the respondent. Both were engaged in the same line of business, floating ties from the Big Piney and Gasconade to this point on the Gasconade, for the purpose of having them transported by the St. Louis & San Francisco Railroad Company from the same station on the railroad to their destination, and for the railroad company to attempt to say to one shipper "You may land your rafts at a certain part of our grounds and haul them over the river and across those grounds to our station and there load them," and to say to another intended shipper, "You can not do this, but must go above or below onto private property and there pay the tolls that may be exacted of you for the privilege of reaching, by a roundabout way, our loading switch," is, to our minds, a clear case of discrimination in favor of one against the other, and is a plain case of affording superior facilities for the transportation of freight to one shipper as against another, each of them then engaged in identically the same business.

In *Chicago & Alton Ry. Co.* v. *United States* (156 Fed., 558) the facts show that the railroad company in that case published a schedule of through rates which included a belt line charge of a certain amount per car for hauling cars of freight from

industries along the tracks of the belt-line railroad with which it connected. The Schwarzschild & Sulzberger Company operated a meat-packing plant adjoining the tracks of the belt line; around its plant the S. & S. Co. had constructed about a mile and a half of track, switches, and sidings, which connected with the belt-line tracks. The Chicago & Alton transferred various carloads of freight for the S. & S. Co. and charged the full amount of the published rates, but paid back to the S. & S. Co. "a refund of terminal charges" of $1 per car for the use made of the S. & S. tracks in getting the S. & S. Company's cars of freight out upon the belt-line tracks. The court held that this practice constituted a giving of a rebate in violation of the Elkins Act. The court says, at page 561:

> The foregoing considerations compel us to the conclusion that the judgment can not be sustained except by holding that the contract between S. & S. Co. and the Alton was illegal and void.
>
> The use that the contract provided for was the use that was made in hauling S. and S. freight from inside of the S. and S. plant out to the S. and S. property line, so that there might be put on the Belt Line's track, which in these through routings is to be taken as a part of the Alton system. Plaintiffs in error defend the arrangement on the ground that an interstate commerce carrier has the right to pay a shipper a just allowance for the use of any instrumentality furnished to the carrier

by the shipper in connection with the transportation of the shipper's property.

At page 562:

> This case is ruled in principle, we believe, by the decision in *Wight* v. *United States* (167 U. S., 512; 17 Sup. Ct., 822; 42 L. Ed., 258) that an arrangement whereby a particular shipper was allowed to offset against his freight bills the true value of the use of his teams in hauling the property from the railroad to his warehouse was a discrimination against other shippers of the same class of property in the same city who were compelled to pay the freight in full. It is contended that the citation is inapplicable because the question there was of discrimination and here of rebate. Under the Cullom Act (act February 4, 1887, c. 104, 24 Stat., 379 (U. S. Comp. Stat., 1901, p. 3154)) the standard of comparison was the treatment of other shippers. It was necessary to prove not only that the favored shipper really paid less than the published rate, but also that other shippers paid the full rate or a greater rate than that of the favored shipper. Under the Elkins Act the standard of comparison is the published rate. It is only necessary to prove that the favored shipper has had his property transported at a less rate than that published and filed. Both acts were aimed to kill favoritism, and the favoritism in the Wight case was of the same kind and effect as in this.

That the terminal company had power to lease its property or alienate its real estate does not affect the

question. The vice of the arrangement lies not in the power of the terminal company to lease, but in the nature and effect of the lease. Granting that a common carrier may dispose of any property which it does not need in the performance of its business, it does not follow that the lawful tariffs of the carrier may be set at naught and an undue preference accorded the lessee.

In *New York, New Haven & Hartford R. R. Co.* v. *I. I. C.*, 200 U. S., 361, this court, holding invalid a contract by which a carrier agreed to carry certain coal for another railroad at less than the published rates, said (p. 397):

> Indeed, the proof leaves no doubt upon our mind that, in making the contract, the Chesapeake & Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the interstate commerce act. In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line and thereby, as it conceived, to increase the carriage of that commodity and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of

attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the interstate commerce law rests and a substitution in their stead of the conception of the Chesapeake & Ohio, as to what was best for itself and for the public. Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariffs of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines and increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give

> vitality to the prohibition of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibition would be rendered wholly ineffective by deciding that a carrier may avoid these prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depend not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

In *Armour Packing Company* v. *United States* (209 U. S., 56) the facts show that a contract was made naming a rate for transportation in the future, which was the then published rate. After the contract had been executed the carrier increased the rate, but received from the Armour Packing Company the lower contract rate. The Supreme Court affirmed a fine under the Elkins Act against the packing company. In that case the court said, at page 80:

> It is strongly urged that there is nothing in the acts of Congress regulating interstate commerce which can render illegal the contract between the shipper and the railroad

> company covering the period from June to December, 1905. The contract, it is insisted, was at the legal, published, and filed rate, and there is nothing in the law destroying the right of contract so essential to carrying on business such as the petitioner was engaged in. But this contention loses sight of the central and controlling purpose of the law, which is to require all shippers to be treated alike and but one rate to be charged for similar carriage of freight, and that the filed and published rate be equally known by and available to every shipper.

In *Union Pacific R. R. Co.* v. *Goodridge* (149 U. S., 680) the court had under consideration a contract by which one coal company was charged less rates for transportation than were charged other companies, in consideration of the sale by such coal company to the railroad company of coal for the use of the railroad company, and in further consideration of the compromise and settlement of a claim of the coal company against the railroad company. It was contended on behalf of the railroad that there was a general power in the railroad company to make contracts to the same extent as individuals, and to settle and compromise matters in litigation.

The court answered at page 691:

> There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and if no one else were interested in the transaction that rule might apply here; but the legislature, upon

> grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory, if this rule were given full effect. For this reason we think the railroad company is in error in its assumption that "if, in the honest judgment of the officers of the defendant company, who made the contract, the considerations which entered into it, and upon which alone it was made, were sufficient to warrant the company to pay back to the Marshall Company 40 cents per ton for each ton it shipped for five years, that is enough." This is but a restatement in different language of a comment made by the court below in its opinion, that "the whole answer amounts only to this: That the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory to defendant; and it is obvious that this is no answer to a complaint of unlawful discrimination." * * *

In *Wight* v. *United States* (167 U. S., 512) the court considered an arrangement made between a railroad and a shipper by which the shipper was allowed what amounted to a reduction in his freight rate in consideration of cartage performed by the shipper, such allowance not being made to other shippers. It was contended by the railroad company that there was nothing objectionable in this contract; that the company had a perfect right to make an agreement by which it could perform extra service

for one shipper over that rendered to another. Of this arrangement Mr. Justice Brewer said, at page 517:

> * * * Regard must always be had to the substance and not to the form. Indeed, the section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback, or other device" to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to "state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

In considering whether there is a violation of the provisions of the law against unjust discriminations and preferences, the one fact to be considered is whether the arrangement, contract, or understanding actually produces a discrimination or preference, and not whether the contract or practice would be lawful if it did not produce that discrimination or preference. It makes no difference what form the preference may take. In this case it is not material, therefore, that it assumed the form of a contract for the use of a part of

certain terminal facilities, or that it was called by the parties a lease of realty. The fact remains that a preference was actually given, and this is the one fact that is material.

The finding of the Commission that as a matter of fact the contract with Young constituted an undue preference will not be disturbed by the court unless so arbitrary as to transcend the limits of legitimate regulation.

The Commission which had before it all the testimony found, as a fact, that there was an undue preference accorded to Young by the contract with the Southern Pacific Terminal Company. It is not claimed that there was not a full and complete hearing before the Commission on the question involved. There is no contention that the Commission took into consideration matters that should not have been considered or that the Commission did not proceed properly under the act in determining the question of fact presented. Nor is there any contention that the Commission had before it no evidence on the subject. The appellants are merely asking the court to substitute its opinion as to whether the contract in question constituted an undue preference for that of the Commission. Under such circumstances the court will not review the evidence before the Commission to determine whether the court would have been of a different opinion upon the question of fact but will accept the finding of the Commission. The investigation of the court is limited to a determination whether the Commission,

in making its finding of fact, went beyond the limits of its powers or whether its action amounted to the taking of property of the appellant without due process of law. *Interstate Commerce Com.* v. *Ill. Cent. R. R. Co.* (215 U. S., 452).

In the case at bar we have not only the finding of the Commission but the conclusion of the Circuit Court that upon the evidence there was shown to have been an undue preference given to Young.

This court, speaking of a finding of the Commission as to the reasonableness of a rate, which finding was sustained by the Circuit Court, said, in *Ill. Cent. R. R. Co.* v. *Interstate Commerce Com.* (206 U. S., 441), at page 454:

> In any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reenforced by a concurrent judgment of the Circuit Court.

In *C. N. O. & T. P. Ry.* v. *Interstate Commerce Com.* (162 U. S., 184), at page 196, the court says:

> As already stated, the Circuit Court of Appeals adopted the views of the Circuit Court in respect to the reasonableness of the rate charged on first-class freight carried on defendants' line from Cincinnati to Atlanta;

> and as both courts found the existing rates to have been reasonable, we do not feel disposed to review their finding on that matter of fact.

The question whether a given practice constitutes an undue preference is equally a question of fact to be determined by the Commission. The act itself does not define what constitutes an undue preference or advantage, and it is the function of the Commission to determine from the evidence before it as a matter of fact whether any given contract or practice actually gives any shipper an undue preference. (*State* v. *Adams Express Co.*, 85 N. E., 337.)

In *Interstate Commerce Com.* v. *Alabama Midland Ry.* (168 U. S., 144), at page 170, the court says:

> As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it can not be doubted that whether, in particular instances, there has been an undue or

unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. (*Denaby Main Colliery Co.* v. *Manchester, etc., Ry. Co.*, 3 Railway & Canal Traffic cases, 426; *Phipps* v. *London & North Western Railway, 1892*, 2 Q. B. D., 229; *Cinti., N. O. & Tex. Pac. Ry.* v. *Interstate Com. Com.*, 162 U. S., 184, 194; *Texas & Pacific Ry.* v. *Interstate Com. Com.*, 162 U. S., 197, 235.)

There was before the Commission abundant evidence to show the character and effect of the contract between Young and the Southern Pacific Terminal Company. That it gave Young exclusive privileges and facilities upon the wharf of the terminal company is clear; that it enabled Young to ship his products without paying the wharfage charge of 20 cents per ton exacted according to the published tariffs from all other shippers of such product is not disputed; that it enabled Young to escape demurrage charges and do his unloading at a less cost than other shippers would have to pay, and to secure other advantages over shippers in the same business, is apparent from the statement of facts. The Commission had before it all the testimony on the subject. Its finding, therefore, on this question of fact, enforced as it is by the conclusion of the Circuit Court, should not be disturbed.

CONCLUSION.

We submit that the order of the Commission was valid and was properly upheld by the Circuit Court. Its jurisdiction extended to the Southern Pacific Terminal Company because that company was engaged in the business of furnishing facilities for the Southern Pacific Railroad and Steamship system and its terminal charges were included in the tariffs published by the railroads with which it connected and for which it furnished terminals. The order of the Commission was the regulation of interstate commerce because, as is admitted, the shipments made by Young were, to a large extent, interstate shipments—that is, from points outside of Texas to points within the State of Texas—on which Young paid a charge less than that exacted from other shippers; further, because all the shipments by Young were destined for, and made to, a foreign country; and finally that, if part of the shipments of Young were intrastate yet the order of the Commission is valid in so far as it concerns interstate shipments and the order is not presumed to go beyond the power of the Commission. The contract between the terminal company and Young constituted an undue preference, as it clearly gave Young a rate free from terminal charges, and other expenses, and therefore was less than that accorded to all other shippers. Upon the facts before it the Commission found that it did constitute an undue preference, and this was a finding upon a question of fact the wisdom of which

will not be reviewed by this court. The decree of the Circuit Court was in conformity with the act to regulate commerce and there was no error in the failure of the court to go further and decide other questions, which it was not authorized to decide by the act conferring jurisdiction upon it.

Respectfully submitted.

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LUTHER M. WALTER,
Counsel for the Interstate Commerce Commission.
DECEMBER, 1910.

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SOUTHERN PACIFIC TERMINAL COMPANY *v.* INTERSTATE COMMERCE COMMISSION AND YOUNG.

YOUNG *v.* INTERSTATE COMMERCE COMMISSION ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

Nos. 459, 460. Argued December 9, 1910.—Decided February 20, 1911.

The case is not moot where interests of a public character are asserted by the Government under conditions that may be immediately repeated, merely because the particular order involved has expired. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308.

The rule that this court will only determine actual controversies, and will dismiss if events have transpired pending appeal which render it impossible to grant the appellant effectual relief, does not apply to an appeal involving an order of the Interstate Commerce Commission merely because that order has expired. Such orders are usually continuing and capable of repetition, and their consideration, and the determination of the right of the Government and the carriers to redress, should not be defeated on account of the shortness of their term.

The Interstate Commerce Commission has jurisdiction to regulate charges of a terminal company which is part of a railroad and steamship system and operates terminals such as those of the Southern Pacific Terminal at Galveston, Texas.

Verbal declarations cannot alter facts; and although the different parts of a system may be separate as regards their charters, each forms a link in the chain of transportation. One of the separate links in a system controlled by a holding company such as the Southern Pacific Company cannot escape regulation by the Commission, because designated as a wharfage company; its property is necessarily employed in the transportation of interstate commerce.

All shippers must be treated alike; and, under the facts in this case, an arrangement, involving the lease of a wharf at a stipulated rental, between the shipper and a corporation whose wharves and terminal facilities thereon form links in a chain of interstate transportation, amounts to an unlawful or undue preference under the Interstate Commerce Act, the Commission having found the facilities amounted

to an absolute advantage to the favored shipper, and that similar facilities could not be given to other shippers.

Where a means of interstate transportation is used to give one shipper an undue preference, the traffic comes under the jurisdiction of the Interstate Commerce Commission.

Goods actually destined for export are necessarily in interstate, as well as in foreign, commerce, when they actually start in the course of transportation to another State or are delivered to a carrier for transportation, *Coe* v. *Errol*, 116 U. S. 577; this is the same whether the goods are shipped on through bills of lading or on an initial bill only to the terminal within the same State where they are to be delivered to a carrier for the foreign destination.

THIS is a bill in equity to enjoin an order of the Interstate Commerce Commission requiring appellants to cease and desist, on or before the first day of September, 1908 (subsequently postponed to November 15, 1908), and for a period of not less than two years thereafter, from granting and giving undue preferences and advantages to one E. H. Young, a shipper of cotton seed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cotton seed cake and meal over the wharves, docks and piers of appellants, while at the same time exacting such charges from other shippers of cotton seed cake and meal, and from giving and allowing him or any other person whomsoever, for his exclusive use, space on the wharves of appellants at Galveston for use in the storage and handling of cotton seed cake and meal, while contemporaneously refusing and denying similar privileges to other shippers under substantially similar circumstances and conditions.

Young was not a formal party before the Interstate Commerce Commission. However, he was made a respondent in this suit, and filed an answer and cross bill. The Commission demurred to both bill and cross bill, and, the demurrer being overruled, answered.

On final hearing the case was submitted upon an agreed statement of facts, and both bills were dismissed.

The most important facts we set out below and in the opinion. We refer to the report of the Interstate Commerce Commission for further details.

The Republic of Mexico conveyed to one Menard the property upon which the wharves of the Terminal Company are situated. Menard conveyed the property to the president and directors of the Galveston City Company, who conveyed it to Collis P. Huntington for the sum of $200,000, and it is recited in the deed to him that it "is made upon the further Express Covenant and condition as follows: . . . when through and by means of such acts of Congress, act of the legislature, and ordinance and conveyance from the city of Galveston, if any, as may be required for the purpose, . . . the right has been secured to the said Collis P. Huntington, or his heirs or assigns, to construct piers, as he or they may from time to time determine, . . . then and in that event the said Collis P. Huntington, his heirs or assigns, will within six months thereof commence the construction of terminal facilities upon the property . . . for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems."

The city of Galveston, on the fourth of February, 1899, passed an ordinance which recited the conditions of Huntington's purchase to be as above stated, and that it was greatly to the interest of the city that the work contemplated by him should be performed, and that for the proper utility of the property no streets should be opened through or across it, and it was ordained that streets, avenues or alleys, if any, theretofore opened, laid out or in any manner designated upon the property be perpetually abandoned, discontinued and closed. And Huntington, his heirs and assigns, were granted the right perpetually to construct and maintain piers as he or they might from time to time determine, "and to maintain upon the property terminal facilities for the use of what are commonly

called the Southern Pacific Railroad and Steamship Systems, their successors or assigns." It was provided that if Huntington should "charge wharfage for the use of such piers and other facilities upon said property, except so far as wharf service" might be covered by the freight rate, all such wharfage should be subject to the regulation of the railroad commission of Texas. And it was recited that it was greatly for the public interest that the property "should be developed for shipping and transportation purposes, and that the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and State. . . ."

The ordinance was ratified by an act of the legislature approved May 1, 1899. The act set out the ordinance in full and relinquished to Huntington the title and claim of the State to the property upon the conditions expressed in the ordinance and, in addition to subjecting the wharfage charges to regulation by the railroad commission, required an annual report to that body. And it was provided "that the system of railroad tracks" which might be constructed by Huntington on the property should connect with the track of any railroad company which might be built to the property, at a place designated; and, further, that there should be no consolidation of the property, or the stock or franchise of any corporation which might own or control the same, with the Galveston Wharf Company or any other wharf company by which the "wharf or other terminal charges should be fixed," and that "no charter formed for the use, operation and management of the property" should be granted without containing the section providing as above.

Huntington performed the conditions expressed in the conveyance and in the ordinance and the act of the legislature.

The Southern Pacific Terminal Company is a Texas

corporation, organized in 1901 to construct and maintain wharves and docks for the accommodation of all kinds of vessels, "and to avail of, use and enjoy the properties, rights, privileges and franchises granted and described and referred to in the act of the legislature of the State of Texas of May 1, 1899, ratifying the ordinance of the city of Galveston, and to construct and maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems."

At the time of the incorporation of the Terminal Company the following were commonly referred to as the Southern Pacific Railroad and Steamship Systems: the line of steamships owned by the Southern Pacific Company, running from New York to Galveston and New Orleans, and also running from and between the latter city and Havana; Morgan's Louisiana and Texas Railroad and Steamship Company; the Louisiana Western Railroad, which leads from New Orleans to the Sabine River; the Texas and New Orleans Railroad, leading from that river to the city of Houston; the Galveston, Harrisburg and San Antonio Railway, and the railroads in which the Southern Pacific Company owns stock, extending from the connection of the latter in El Paso at the Rio Grande River to San Francisco. Each of the railways was incorporated as a separate and distinct railway and has its own officers and board of directors, but the Southern Pacific Company owns ninety-nine per cent of their stock and the same per cent of the stock of the Terminal Company. The two latter companies have the same president, and the Galveston, Harrisburg and San Antonio Railway Company and the Terminal Company have the same general manager.

Import and export traffic passing through Galveston passes over the wharves of the Terminal Company, and the only track facilities for such traffic are those owned by the

Terminal Company on its own lands. And the Galveston, Harrisburg and San Antonio Railway is the only railway having physical connection with the tracks of the Terminal Company, and it does all of the switching to and from the tracks of the Terminal Company, charging $1.75 per car. The latter company receives a trackage charge of 50 cents per car.

The Terminal Company owns no cars or locomotives and issues no bills of lading. It owns no stock in any of the railroads or corporations in which the Southern Pacific owns stock. It carries on a wharfage business and publishes a schedule of charges for such business, which, however, is not filed with the Interstate Commerce Commission, its charge being twenty cents per ton on cotton seed meal and cake passing over its docks, and is shown as wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and all other railways entering Galveston. Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young as hereinafter shown, but as a fact the wharfage charge is not imposed by the Terminal Company on the cotton seed meal and cake handled over the dock of E. H. Young other than as the same may be included in the general lease or contract price fixed as hereinafter indicated.

The Terminal Company was a party to numerous circulars issued by the Southern Pacific Companies, known as the "Sunset Route," so termed, principally for advertising purposes. The circular of May 24, 1907, shows terminal charges (other than storage and switching). At the port of Galveston the circulars show a charge of one cent per 100 pounds on cotton seed cake and meal.

The Terminal Company has on its property two piers, known as pier "A" and pier "B," and has erected on them all facilities for handling imported and exported freight, and all freight which may come to or pass over its

wharves, and it has abundant land under water upon which to erect other piers if they should become necessary.

It charges a fixed wharfage for all freight passing over its piers to or from vessels berthed thereat. The Galveston Wharf Company affords similar public wharfage facilities at the port of Galveston, having a number of piers. If the facilities of the Galveston Wharf Company should be destroyed those of the Terminal Company would become inadequate for handling the import and export and coastwise business. Ships to and from foreign ports, and coastwise ships other than those of the Southern Pacific Company, berth at piers "A" and "B," and there receive and deliver freight, and at these piers the Terminal Company carries on its general wharfage business.

In the building of pier "B" it was necessary to dredge a slip west of it, where ships could berth, and in order that the soil, through the action of storm and wave, should not drift into the slip, a bulkhead was built. To the westward of the slip the lands of the Terminal Company were lying idle and useless, they not being needed by it, and in pursuance of negotiations with Young the company proceeded to construct a pier, known as pier "C," for the use of Young, and to erect thereon a warehouse, shed and platform for his use, the original construction and subsequent enlargement of which cost the company about $65,000. At this time the pier is 300 feet wide at its widest part and about 1,400 feet in length.

The negotiations terminated in a lease under which Young is to pay the Terminal Company a yearly rental of $15,000, payable monthly from the first day of November, 1906. And he agrees that he will route all shipments of cotton seed and cotton seed products purchased or shipped by him "over the lines of said Terminal Company and its connections, according to the instructions of said Terminal Company from time to time," and that he will insist upon and enforce such routing, except where the

enforcement will prevent him from purchasing such products or from obtaining shipments which will be ready to move immediately and for which cars cannot be procured for the routing required. It is provided, however, that Young shall not be bound by these provisions if the rates be not equal to or lower than those of other competing lines or the service be not as adequate, but notice is to be given of such lower rates and service and an option to meet them.

The business of Young is that of a merchant and manufacturer, engaged in buying, selling and converting cotton seed cake and meal for his own account. He took possession of pier "C" and the improvements erected thereon by the Terminal Company under his contract with the latter company, paying the price stipulated in the contract, and has placed thereon cake, sacking and grinding machines, representing an investment of $50,000. Young's business consists in buying cotton seed cake in the interior, shipping it to himself by carloads at pier "C," there grinding it into meal, sacking it and loading it into steamships berthed at pier "C" for export.

All cotton seed meal cake passing over piers "A" and "B" pays a wharfage of 20 cents per short ton. Young pays no wharfage or storage charge other than as the same may be included in the rental of $15,000 per year. If any exporter handles cotton seed meal or cake over pier "C" the wharfage of 20 cents per ton is paid by him to Young.

Young has certain advantages by reason of his contract with the Terminal Company, which are enumerated in the agreed statement of facts and the result of which is stated as follows: "He makes a sum equal to 30 or 40 cents per ton more than he would receive if he handled his export product under methods in existence before he established his plant on pier 'C' and adopted the method of business he follows. This 30 to 40 cents per ton is in addition to the ordinary buying and selling profit." He

at times pays more for cotton seed cake than his competitors can afford to pay, and at times he can undersell them in European markets, and since he commenced business some of the exporters who were engaged in business when he commenced have ceased exporting. A comparison of his business with that of all other exporters of cotton seed cake shows that from September 1, 1906, to September 1, 1907, he exported 105,000 tons of cotton seed cake and about the same amount of cotton seed meal; they, 50,000 tons of both products.

"Some of the cotton seed cake producers at interior mills in the State complain that Young is able to dominate the Texas market, and that his method of conducting business at Galveston enables him to command the foreign trade and may become a detriment to the cotton seed cake and meal industry, in that Young might acquire a monopoly. Others entertain a contrary opinion. They all agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired, it would be of great benefit to the cotton seed industry.

* * * * * * * *

"On the present constructed docks of the Galveston Wharf Company and the Terminal Company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young."

This proceeding was instituted September 11, 1907, by Carl Eichenberg, an exporter of cotton seed and its products from the port of Galveston, by filing his complaint or petition before the Interstate Commerce Commission against the Southern Pacific Company and the Terminal Company, complaining that the companies, by the arrangement with Young, were violating § 3 of the act to regulate commerce, by giving him an undue and un-

reasonable preference and advantage over his competitors.

By order of the Commission the Galveston, Harrisburg and San Antonio Railway Company and other railroad companies entering Galveston were made parties defendant.

Answers were filed and full hearing was had by the Commission, which on June 24, 1908, made its report and order.

No rehearing was asked by defendant before the Interstate Commerce Commission. Young was not made a party to the proceedings before the Commission, but he appeared and testified as a witness for the Terminal Company, and his counsel was present at the hearing when the testimony was taken and engaged in the examination of witnesses. Young was also present when the case was argued and submitted.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* and *Mr. H. M. Garwood* were on the brief, for appellants:

The Interstate Commerce Commission cannot deny to a wharf company, chartered under the laws of the State of Texas, the power to lease or convey real estate which it owns in fee simple and its title to which has been sustained. See *Galveston* v. *Menard*, 23 Texas, 408; *Texas* v. *Galveston*, 38 Texas, 13; *Galveston Wharf Co.* v. *Galveston*, 63 Texas, 14; *Galveston City Co.* v. *Galveston*, 56 Texas, 486.

The supposition of the Interstate Commerce Commission that the title to the property was acquired by the ordinance of the city of Galveston and the special act of the legislature approving the same is not correct. The contract between the Terminal Company and Young is not in violation of the terms of the grant. The owner of property abutting upon a navigable stream can devote it to other purposes than that of a public wharf. *L. & N.*

R. R. Co. v. *West Coast Co.*, 198 U. S. 483; *Atchison &c. Ry. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S. 667; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345.

Although interstate commerce may pass over a wharf, that wharf may be strictly a private wharf, and the owner does not become a common carrier subject to the jurisdiction of the Interstate Commerce Commission. The right to erect a landing on a navigable stream has its foundation in the ownership of the land, and when erected by an individual or corporation at its own expense, such landing is private property. *Leverich* v. *Mayor of Mobile*, 110 Fed. Rep. 170; *Compton* v. *Hankins*, 90 Alabama, 411; *O'Neill* v. *Annett*, 27 N. J. L. 290; *Woodruff* v *Havemeyer*, 106 N. Y. 129.

Even if the Terminal Company were a common carrier, and if the jurisdiction of the Interstate Commerce Commission were unquestioned, it nevertheless has the right to sell or convey unused portions of its property which it owns in fee simple. *Calcieu Lumber Co.* v. *Harris*, 77 Texas, 18; *A., T. & S. F. Ry. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S. 667, 682; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403.

An order of the Interstate Commerce Commission which forbids a wharf company from using, by way of lease, its property for warehouse and manufacturing purposes, effectually confiscates private rights. *Central Stock Yards Co.* v. *L. & N. Ry. Co.*, 192 U. S. 568; *United States &c.* v. *Oregon R. R. & Navigation Co.*, 159 Fed. Rep. 975.

The Southern Pacific Terminal Company is not a common carrier and is not subject to the jurisdiction of the Interstate Commerce Commission. It does not fall under cases where, for the purpose of evading laws criminal in their character, holding companies have been organized as a part of what is in reality a conspiracy to evade the law, as was the case in *Northern Securities Co.* v. *United*

States, 193 U. S. 197. By its charter it is authorized to purchase stocks and other classes of securities. The mere fact that it also owns the stock of a common carrier cannot operate to consolidate and make a corporation a wharf company and a railroad company, any more than it could turn a corporation into a banking corporation and a railway corporation, the stock of which it chanced to buy in the open market. *Pullman's Palace Car Co.* v. *Missouri Pacific Ry. Co.*, 115 U. S. 587; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *United States* v. *Del. & Hudson Co.*, 213 U. S. 366; *White* v. *Pecos L. & W. Co.*, 18 Tex. Civ. App. 634; *Exchange Bank* v. *Macon Construction Co.*, 97 Georgia, 1; *A., T. & S. F. R. R. Co.* v. *Cochran*, 43 Kansas, 225.

The ownership of the stock of the Galveston, Harrisburg and San Antonio Railway Company and the Terminal Company does not in any manner whatsoever effect an amalgamation of these companies in any legal sense. Each has its own separate corporate organization, and is absolutely independent of the other. In no case has the Interstate Commerce Commission undertaken to stretch its jurisdiction to this extent. Its own decisions are directly against such an assumption of authority. *Cattle Raisers' Assn.* v. *Ft. Worth & Denver Ry. Co.*, 7 I. C. C. Rep. 513; *Kentucky & Indiana Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 567; *Cotting* v. *Kansas City Stock Yards Co.*, 82 Fed. Rep. 839.

The lease contract held to be unlawful does not, under the facts proven, constitute an unlawful or undue preference under the Interstate Commerce Act. Young by reason of prompt methods adopted for unloading his traffic, and by reason of the warehousing facilities with which he has provided himself, is able to unload the product within the ten days, and hence does not incur the penalties of demurrage charges; not, however, because of any special privilege but because he promptly unloads

his products. The record discloses no fact which would justify the conclusion that any party has been subjected to any undue or unfair advantage by reason of this lease contract. A common carrier has the right to lease or sell property which it owns in fee for the erection of warehouses, elevators, etc., and it is so universal a business method all over the United States that the court may take judicial knowledge thereof. The decision of the Interstate Commerce Commission in this case will revolutionize industrial methods in this country. *Stock Yards Co.* v. *L. & N. R. R. Co.*, 67 Fed. Rep. 35; *Ilwaco Ry. Co.* v. *Oregon Short Line & U. N. Ry. Co.*, 57 Fed. Rep. 673.

The order of the Commission transcends its jurisdiction, in that it regulates commerce purely state and intrastate, and also purely foreign commerce, neither of which is subject to its authority. *G., C. & S. F. Ry. Co.* v. *Texas*, 204 U. S. 403; *Augusta Brokerage Co.* v. *Central of Georgia Ry. Co.*, 5 Ga. App. Rep. 187; *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. Rep. 266, 279. The greater part of the traffic is confined to products which move from a point within the State of Texas to a point within the same State upon a local bill. This is intrastate and domestic traffic. When it leaves the warehouse of Young it goes without the interposition of any common carrier into the hold of a ship direct to Europe. Over this transit the Interstate Commerce Commission has no jurisdiction.

Mr. Wade H. Ellis and *Mr. Luther M. Walter* for appellee, the Interstate Commerce Commission:

The appeal should be dismissed because the Commission's order has expired and the case is now moot. *Mills* v. *Green*, 159 U. S. 651; *Pennsylvania* v. *Wheeling & Bel. Bridge Co.*, 18 How. 421; *San Mateo County* v. *Southern Pac. Co.*, 116 U. S. 138; *Little* v. *Bowers*, 134 U. S. 547; *California* v. *San Pablo & Tulare R. R. Co.*, 149 U. S. 308;

New Orleans Flour Inspectors v. *Glover*, 160 U. S. 170; *Dinsmore* v. *Southern Exp. Co. and Georgia R. R. Comm.*, 183 U. S. 115; *Jones* v. *Montague*, 194 U. S. 147; *Richardson* v. *McChesney*, 218 U. S. 487.

On the merits this case involves three propositions: 1. Whether the Southern Pacific Terminal Company is subject to the act to regulate interstate commerce; 2. Whether the order of the Commission relating to shipments originating both within and without the State of Texas but intended for trans-shipment abroad is a regulation within the jurisdiction of the Commission, and 3. Whether the contract with Young constitutes an undue preference within the meaning of the act to regulate commerce.

The Terminal Company is subject to the act to regulate commerce because it is engaged in the business of furnishing facilities for the Southern Pacific Railroad and Steamship System and its terminal charges are included in the tariffs published by the railroads with which it connects and for which it furnishes terminals. Any fair construction of the Interstate Commerce Act would lead to the conclusion that the Terminal Company is within the terms of the act which by its express language applies to terminal facilities of every kind used or necessary in the transportation or delivery of property. If terminal facilities such as those maintained by the Southern Pacific Terminal Company are not included within the terms of the act then evasion of the provisions of the act so far as they relate to any terminal facilities is possible by every common carrier by the simple expedient of providing a separate corporation nominally to control such facilities. *Eichenberg* v. *So. Pac. Co. et al.*, 14 I. C. C. Rep. 250, 263.

Without regard to the purpose for which the Terminal Company was organized the fact remains that it was holding itself out to the public as furnishing general terminal

facilities for the railroads connecting with it. *Barrington* v. *Commercial Dock Co.*, 15 Washington, 170, 175; *Indian River Steamboat Co.* v. *East Coast Transportation Co.*, 28 Florida, 387; *Missouri Pac. Ry. Co.* v. *Flour Mills Co.*, 211 U. S. 612, 619; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 418.

L. & N. R. R. Co. v. *West Coast Naval Stores Co.*, 198 U. S. 483, is distinguishable, as there was no discrimination between shippers.

The fact that the Terminal Company confines its operations to one State does not affect the question. It is an agency in interstate commerce. *The Daniel Ball*, 10 Wall. 557; *People* v. *Miller*, 178 N. Y. 196.

Not only is the terminal company furnishing terminal facilities for the Southern Pacific System but it is itself an integral part of that system. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 326, 328.

The order of the Commission is a regulation of interstate commerce because the Commission has jurisdiction over all shipments even though part originated within the State of Texas and no advantage can be given to Young that discriminates in his favor and against interstate shippers in the same business. The situation is covered by that class of regulations which the court has described where uniformity is necessary. *Railroad Co.* v. *Fuller*, 17 Wall. 560, 568; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204; *Missouri Pacific Ry. Co.* v. *Larrabee Mills*, 211 U. S. 611; *Int. Comm. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *United States* v. *Colo. & N. W. R. R. Co.*, 157 Fed. Rep. 321, 330.

Even though part of Young's shipments originated within the State of Texas, the business in which he engaged was interstate in character because all the shipments without exception were designed for foreign trade and actually shipped abroad. *Navigation Co.* v. *Insurance Co.*, 32 S. W. Rep. 889.

Even if a portion of Young's shipments are to be considered as not within the provisions of the Interstate Commerce Act the order is not void because the Commission is presumed to have limited its order to the power it had. *Navigation Co.* v. *Campbell,* 177 Fed. Rep. 318.

That it did not point out in detail the manner in which discriminations should be remedied does not make the order void. *N. Y. Cent. & H. R. R. R. Co.* v. *Int. Comm. Comm.,* 168 Fed. Rep. 131.

The contract with Young constitutes an undue preference within the meaning of the act. See §§ 2, 3, 6, and 15.

The act should be liberally construed so as to advance the remedy and retard the wrong. *N. Y., N. H. & H. R. R. Co.* v. *Int. Comm. Comm.,* 200 U. S. 361; *American Express Co.* v. *United States,* 212 U. S. 522, 532.

Every shipper using the terminal facilities was required to pay a certain wharfage charge according to a fixed schedule as well as storage charges. Young was granted the right to use the terminal facilities free of wharfage charges and storage charges for the lump sum of $15,000 per year, whereas if he had paid the regular charges the cost would have been $42,000 per year. Such an agreement clearly constitutes discrimination in favor of Young. Contracts between railroad companies and shippers by which for some stated consideration a less charge is made either for facilities furnished or freight carried than is made to other shippers have frequently been passed upon and held to violate statutes against undue preferences. *Hurley* v. *Big Sandy & C. R. R. Co.,* 125 S. W. Rep. 302; *C. & O. R. R. Co.* v. *Standard Lumber Co.,* 174 Fed. Rep. 107; *Hobart-Lee Tie Co.* v. *Stone,* 117 S. W. Rep. 604; *Chicago & Alton R. R. Co.* v. *United States,* 156 Fed. Rep. 558. That the Terminal Company had power to lease its property or alienate its real estate does not affect the question. The vice of the arrangement lies not in the exercise of the power to lease but in

the natural effect of the contract of lease made. *N. Y., N. H. & H. R. R. Co.* v. *Int. Comm. Comm.*, 200 U. S. 361, 397; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80; *Union Pacific R. R. Co.* v. *Goodrich*, 149 U. S. 680, 691; *Wight* v. *United States*, 167 U. S. 512, 517.

The finding of the Commission that as a matter of fact the contract with Young constituted an undue preference will not be disturbed by this court unless so arbitrary as to transcend the limits of regulation. *Int. Comm. Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *Illinois Central R. R. Co.* v. *Int. Comm. Comm.*, 206 U. S. 441, 454; *C., N. O. & T. P. R. R. Co.* v. *Int. Comm. Comm.*, 162 U. S. 184, 196; *State* v. *Adams Express Co.*, 85 N. E. Rep. 337; *Int. Comm. Comm.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the court.

It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired and that the case having thereby become moot, the appeal should be dismissed.

This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs without any fault of the defendant which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. *Jones* v. *Montague*, 194 U. S. 147, and *Richardson* v. *McChesney*, decided November 28 of this term, 218 U. S. 487. But in those cases the acts sought to be enjoined had been completely executed, and

there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 308, and *Boise City Irr. & Land Co.* v. *Clark* (C. C. App. 9th Cir.), 131 Fed. Rep. 415.

In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress.

In *United States* v. *Trans-Missouri Freight Ass'n, supra*, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: "The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself, for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendant should be enjoined for the future. . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before

judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, there has been no extinguishment of the rights (whatever they are) of the public, the enforcement of which the Government has endeavored to procure by the judgment of a court under the provisions of the act of Congress above cited. The defendants cannot foreclose those rights nor prevent the assertion thereof by the Government as a substantial trustee for the public under the act of Congress, by any such action as has been taken in this case." Referring to the agreement as one claimed by the Government as illegal, it was further said (p. 310): "That question the Government has the right to bring before the court and obtain its judgment thereon." The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached, and that the Government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy or terminate its questions.

In *Boise City Irr. & Land Co.* v. *Clark, supra*, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: "But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter."

The motion to dismiss is denied.

Four errors are assigned in the action of the Circuit

Court in dismissing the bill of complaint. (1) The Interstate Commerce Commission had no jurisdiction over the Terminal Company, it not being a common carrier, and therefore not subject to the act to regulate commerce. (2) The Commission had no power or authority to declare the lease to Young illegal. (3) The lease does not constitute an unlawful or undue preference or advantage within the meaning of the act to regulate commerce. (4) The Commission by its order assumed to control intrastate and foreign commerce, not subject to the act to regulate commerce.

Two facts are prominent in the case, that the piers of the Terminal Company are facilities of import and export traffic at the port of Galveston and that the arrangement of the Terminal Company with Young has enabled him to largely and rapidly increase his business until his exports of cotton seed products are more than twice those of all other competitors, that he derives therefrom 30 to 40 cents per ton over the ordinary buying and selling profit, and that some who were his competitors have ceased to export. A direct advantage to Young is manifest. A direct detriment to other exporters is equally manifest.

The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the Terminal Company had an equally lawful inducement. It had an idle property, it is contended, over which it had absolute control and which it turned to use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership. If the elements of the controversy are correctly stated, the justification may be considered as made out.

Appellants make much of their title and, assuming it to be absolute, assert the right to an unrestrained use of the property. But the assertion overlooks or underestimates the condition expressed in the deed to Huntington, that from his estate to the Terminal Company, in the ordinance of the city of Galveston, and in the act of the legislature of the State of Texas. The condition expressed in all of them was that terminal facilities should be constructed upon the property for the use of the Southern Pacific Railroad and Steamship Systems. The act of the legislature declared that the property "should be developed for shipping and transportation purposes, and that the shipping facilities at the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and of the State." And wharfage charges, except so far as they should be covered by the freight rates, should be subject to regulation by the railroad commission of the State.

It is clear, therefore, that it was the purpose of the ordinance and of the act confirming it to secure shipping facilities for the city, open to public use, and necessarily so, for the property was to be the terminal of a railroad and steamship system. It may be, as it is contended, that there was no necessity for the ordinance, "except for the purpose of a valid relinquishment of the municipal right, often asserted by it, of opening streets through the bay front property and constructing wharves thereon." The relinquishment was treated as valuable and Huntington pledged the property to a public use as a consideration for it. And, as we have said, such use was also a condition expressed in the act of the legislature. It was not discharged by the expenditure of $150,000 and the erection of wharves by Huntington, as seems to be the contention.

The case has no likeness whatever to *Louisville &c. R. R. Co.* v. *West Coast Co.*, 198 U. S. 483. In the latter case there was no discrimination against the West Coast Com-

pany by the railroad company or a preference given to any person. The West Coast Company had the same privilege of using the wharves of the railroad company as other shippers were given. It asserted other privileges. It asserted the privilege of using the wharf for the purpose of transferring goods into vessels which it might arrange to take them; in other words, not into the vessels of the railroad company or into those with which it had traffic agreements. And we said, through Mr. Justice Peckham, "In brief, the fact seems to be that the only complaint of the plaintiff (West Coast Company) is that the defendant (the railroad company) will not permit competing vessels to make use of its wharf for the purpose of such competition."

It is true that there was a contention that the wharf was a public one, but the contention was based only on the fact that the wharf was built at the foot of a public street by authority from the city of Pensacola and the State of Florida. That fact alone was not considered sufficient to support the contention. And it was said, "The city or State authorities in granting the right to erect such facilities might, of course, have attached such conditions as they thought wise, but in their absence neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with defendant." It is true it was said that the railroad company never became a common carrier as to the wharf, in the sense that it was bound to accord to the public or to the West Coast Company the right to use it upon payment of compensation. But it was added that the railroad company would be bound to carry the West Coast Company's goods on the rails which led to the wharf, for the same purpose and upon the same terms that it did for others, viz., in order that it might itself, or through others it had contracted with, forward

the goods beyond its own line. And it was further said that the West Coast Company demanded more than this; it demanded that the railroad company should carry its goods in order that it might itself forward them by vessels of its own selection, and that the railroad company should surrender possession of enough of its wharf to enable the other company to do so.

Nor is *Weems Steamboat Company* v. *People's Company*, 214 U. S. 344, applicable to the pending controversy. The contest there was between two independent lines of steamboats, the one claiming a right to use the wharves of the other, on the ground that the wharves had been dedicated to the public. The fact was found adversely to the contention, and the claim of right to the use of the wharves denied. A review of the reasoning of the court is unnecessary. There is great difference between competing carriers claiming the right to use the facilities of one another and the patrons of the same carrier contending for equality of treatment. In stating this we assume that the wharves in the pending case are the instruments of a common carrier. This is, however, denied, and it is asserted that the Terminal Company is purely a wharfage company, and "has no power under its charter to act as a common carrier." The contention is based on a partial view of the conditions. The Terminal Company was incorporated to execute the purposes expressed in the act of the legislature of the State of Texas, that is, to construct terminal facilities for the Southern Pacific Railroad and Steamship Systems, and to accommodate the export and import traffic at Galveston; and, necessarily, as instrumentalities of such traffic, wharves and piers are as essential as steamships and railroads, and are, in fact, as they were intended to be by the charter of their authorization, parts of a system. The only track facilities for movement of cars to or from the ships, from or to the tracks of the Southern Pacific Railways, are on the Termi-

nal Company's lands, and are owned by it. To these tracks the Galveston, Harrisburg and San Antonio Railway switches cars for other railroads, charging $1.75 per car, and the Terminal Company receives a trackage charge of 50 cents per car. It is true that the Terminal Company does a wharfage business and publishes a schedule of its charges, which, while not filed with the Interstate Commerce Commission, shows a charge of 20 cents a ton on cotton seed cake and meal, and this appears as a wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and other railways entering the city of Galveston. And, besides, the Terminal Company was a party to numerous circulars issued by the Southern Pacific Railway Company, and that effective May 23, 1905, was filed with the Interstate Commerce Commission. These circulars gave terminal charges at the port of Galveston. The charge on cotton seed meal and cake was given at 1 cent per 100 pounds. Shipments on through bills of lading include in the freight rate the wharfage charge.

Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies. As said by the Interstate Commerce Commission, "the Terminal Company was organized to furnish terminal

facilities for the system at the port of Galveston," and it is further said that "through shipments on the railroad lines from and to points in different States of the Union pass and repass over the docks of the Terminal Company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation." And this unity of the railroad's lines and the terminal facilities is recognized in the lease to Young. By it he agrees to route all of his shipments over "the lines of the Terminal Company and its connections, according to the instructions of said Terminal Company from time to time." And provision is made against the possibility of other lines bidding for the traffic by lower rates. In such event he must give notice to the Terminal Company and give it "the option of meeting such proposed rates," and if the company "elects to do so," then he "shall not divert such shipments, but shall abide by the provisions" of his agreement. And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, "a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. . . . The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

The reasoning of the Commission is justified by the

statute. It includes in the term "railroad" "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

The property of the Terminal Company is "necessary in the transportation or delivery" of the interstate and foreign freight transported by the lines of the Southern Pacific system. It is the only terminal for freight moving over the lines of such system, the rails of one of those lines, the Galveston, Harrisburg and San Antonio Railway Company, connecting with tracks upon the docks of the Terminal Company. That the latter collects a trackage charge from the former and it a switching charge from the Terminal Company are, to quote the Commission, "but incidents of the separate corporations."

In opposition to these views appellants urge the legal individuality of the different railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and

made single by it. In all transactions it is treated as single. In the ordinance of the city of Galveston, in the act of 1899, of the legislature of the State, and in public circulars and in the lease of Young, it is the system which is dealt with and not its separate links. And, we have seen, the terminal facilities which the Terminal Company was authorized to maintain were for the system, not for the corporate elements considered separately.

It is next contended that the lease to Young under the facts proven does not constitute an unlawful or undue preference under the Interstate Commerce Act.

To a certain extent we have considered this contention. An absolute advantage to Young cannot be denied. A facility that has enabled him to acquire practically all the export of cotton seed products must have something in it of advantage which other shippers do not receive, and it would seem to proclaim a power working for his benefit which is not working for others. And yet it is urged that there is a contrariety of opinion about it among cotton seed cake producers and as to whether Young is able to dominate the Texas market and to command the foreign trade. The facts, we think, put the matter beyond conjecture or opinion and demonstrate the potency of his situation. That it is a preference, however, is denied; and it is urged that by the agreed statement of facts all cotton seed cake producers "agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired" by Young, "it would be of great benefit to the cotton seed industry." But it is also agreed that neither the Galveston Wharf Company nor the Terminal Company has space enough to afford facilities to "all exporters doing business at Galveston" such as Young. And the Commission found that as a practical matter other shippers could not be given the same facilities on the same conditions as those granted to him, nor could such fa-

cilities be secured on the bay front. It was further found that the Terminal Company had indicated that it is not willing to accord shippers generally such facilities, and that the situation of its docks with respect to space is such that it cannot do so even if it were willing. It may be contended that the patrons of a railroad are not obliged to seek or compete for extraordinary facilities in its terminals. But, be that as it may, all shippers must be treated alike.

Appellants bring forward the same argument to support the contention under consideration which they advance to support their first contention, to wit, the right, as owner of the property, to make a lease of its "unused property," subject only to the limitation that there shall be no interference "with the use of the adjacent navigable waters." It would seem that, if the argument have any force at all, it would extend the rights of ownership to used as well as unused property and be exercised in any form of preference, even to the exclusion of some shippers from the wharves. However, as appellants do not press the argument so far we need not dwell upon it and will only add that the terminal facilities contemplated by the ordinance of the city of Galveston and the act of the legislature of Texas confirming it were public terminal facilities, not those which might be granted or withheld in preferences or discriminations.

The last contention advanced is that "the order of the Commission transcends its jurisdiction, in that it regulates commerce purely State and intrastate, and also purely foreign commerce, neither of which is subject to its authority."

In support of this contention it is insisted that the evidence shows the following facts: The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way bills, showing

the point of origin in those States and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston. At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order.

This evidence establishes, appellants contend, that the transit of the cake and meal is absolutely ended at the leased premises at Galveston, and that it is "a final point of concentration and manufacture, the cotton seed cake being there manufactured into meal and sacked for export." But this does not distinguish between the meal and the cake, nor between the meal that is purchased at points outside of Texas and directly exported, from that so purchased and manufactured on the wharves of the Terminal Company. Nor does it take account of the fact that the wharves were intended for shipping facilities, a means of transition from land carriage to water carriage. It is manifest, as we have said, that to make the wharves manufacturing or concentrating points for one shipper and not for all is to give that shipper a preference. And, being a preference, the traffic necessarily comes under the jurisdiction of the Interstate Commerce Commission. In other words, the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the trans-shipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise

would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol*, 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transportation to another State, or delivered to a carrier for transportation." In *G., C. & S. F. Ry. Co.* v. *State of Texas*, 204 U. S. 403, the facts are different and the case is not apposite.

Decree affirmed.